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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

- - - - -X
UNITED STATES OF AMERICA 03-CR-6033(L)
vs.
CHAD MARKS, Rochester, New York
Defendant. December 17, 2019
9:30 a.m.
- - - - -X

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DAVID G. LARIMER
UNITED STATES DISTRICT JUDGE

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I N D E X

WITNESS FOR THE GOVERNMENT

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EXHIBIT RECEIVED

Government 1
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Defense A
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P R O C E E D I N G S

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(WHEREUPON, the defendant is present).

THE COURT: Good morning to counsel.

MR. RODRIGUEZ: Good morning, Judge.

THE COURT: Mr. Rodriguez, Mr. Gleeson.

MR. GLEESON: Good morning, Judge.

THE COURT: Mr. Marks, good morning.

THE DEFENDANT: Good morning.

THE COURT: Ms. Harrington on the line?

MS. HARRINGTON: Yes, I am. Good morning, Your Honor.

THE COURT: All right, good morning, good morning.

I guess we are assembled and prepared to proceed?

MR. GLEESON: Yes.

MR. RODRIGUEZ: Yes, Judge.

THE COURT: Mr. Rodriguez, I suspect you have a witness?

MR. RODRIGUEZ: I do, Your Honor. We call -- may I call him?

THE COURT: I think we're ready.

MR. RODRIGUEZ: We call Steven Wascher.

GOVERNMENT'S WITNESS, STEVEN WASCHER, SWORN

DIRECT EXAMINATION

THE COURT: Please state your name and spell it for

1 the record.

2 **THE WITNESS:** Steven Wascher. S-T-E-V-E-N;

3 W-A-S-C-H-E-R.

4 **THE COURT:** W-A-S?

09:47:35AM 5 **THE WITNESS:** C-H-E-R.

6 **THE COURT:** Thank you. You can have a seat up there
7 in the witness area. All right, keep your voice up a little
8 bit and we'll proceed when you're ready, Mr. Rodriguez.

9 **MR. RODRIGUEZ:** Thank you, Judge.

09:47:58AM 10 **BY MR. RODRIGUEZ:**

11 Q. Good morning, Mr. Wascher. How are you?

12 A. I'm well.

13 Q. Would you please tell Judge Larimer where you're employed?

14 A. FMC Lexington.

09:48:05AM 15 Q. And FMC is?

16 A. Federal medical center.

17 Q. That's a Bureau of Prisons facility?

18 A. That's correct.

19 Q. And how long have you worked for the Bureau of Prisons?

09:48:16AM 20 A. Since 2014.

21 Q. What is your current assignment with the Bureau of Prisons
22 at FMC Lexington?

23 A. I'm an SIS technician.

24 Q. What does an SIS technician do generally?

09:48:30AM 25 A. We're responsible for maintaining the safety and security

1 of the inmates and staff in the organization. We do that by
2 gathering information, intelligence through monitoring of
3 e-mail communications, interviewing inmates, investigations,
4 stuff like that.

09:48:45AM 5 Q. Now, how long have you --

6 **THE COURT:** I'm sorry, what's the SIS stand for?

7 **THE WITNESS:** Special Investigation Section, Your
8 Honor.

9 **THE COURT:** Oh, thank you.

09:48:54AM 10 **MR. RODRIGUEZ:** Thanks, Judge.

11 **BY MR. RODRIGUEZ:**

12 Q. How long have you been a technician with SIS?

13 A. Started in June of this year, sir.

14 Q. What did you do before you became an SIS technician?

09:49:05AM 15 A. I was an officer, correctional officer.

16 Q. At FMC Lexington?

17 A. Yes, sir.

18 Q. Judge Larimer was good enough to point out that I referred
19 to you as officer at the last hearing, but you're not an
09:49:16AM 20 officer? You're a technician, correct?

21 A. That's correct.

22 Q. You had been an officer before?

23 A. Yes, sir.

24 Q. And were you promoted to become a technician?

09:49:25AM 25 A. Yes, sir.

1 Q. Do technicians answer to officers?

2 A. No.

3 Q. We'll come back to what you do at the facility in a
4 moment, but I would like to talk a little bit about what you
09:49:39AM 5 did before you came to the Bureau of Prisons, okay?

6 A. Yes, sir.

7 Q. Would you tell us what you did out of high school?

8 A. Graduated high school, joined the United States Army.

9 Q. When did you get out of high school?

09:49:52AM 10 A. 1991.

11 Q. You went right into the Army?

12 A. Yes, sir.

13 Q. How long were you in the Army?

14 A. From 1991 until 1998.

09:49:58AM 15 Q. And when you left the Army what was your rank?

16 A. E5 sergeant.

17 Q. What did you do in the Army during the eight years that
18 you served the country?

19 A. My job assignment was military police officer.

09:50:11AM 20 Q. You've got to keep your voice up.

21 A. Military police officer.

22 Q. Were you stationed abroad at any time?

23 A. I was stationed in numerous locations in the United States
24 and overseas in eastern Europe.

09:50:23AM 25 Q. What were some of the places where you were stationed

1 abroad?

2 A. All over the Falkland theater, Hungary, Bosnia, Sarajevo,
3 Brcko, throughout the -- it was during the conflicts over
4 there, so I traveled in multiple locations.

09:50:36AM 5 Q. Now, you indicated that you left the Army what year?

6 A. 1998, sir.

7 Q. What did you do after you left the Army in 1998?

8 A. I became a Department of Defense contractor.

9 Q. And what kind of work did you do as a Department of
09:50:51AM 10 Defense contractor?

11 A. It was mostly security and intelligence based contracting.

12 Q. Can you describe to Judge Larimer what that entailed?

13 A. Initially my first contracts were coordinated with the
14 military to locate and retrieve high value targets, people who
09:51:10AM 15 were designated as terrorists for the United States
16 Government.

17 Q. Where did you do this type of work?

18 A. In the Middle East: Kuwait, Iraq, Afghanistan.

19 Q. In addition to locating high value targets in these
09:51:25AM 20 places, what else did you do as a defense contractor?

21 A. I did executive protection. We guarded dignitaries, VIPs,
22 presidential motorcades, stuff like that overseas in hostile
23 environments; and I was a counterintelligence investigator for
24 the Department of Defense.

09:51:42AM 25 Q. Without giving us obviously any classified information,

1 what type of work did you do as a counterintelligence
2 investigator?

3 A. It was along the same lines as my initial contracts. We
4 worked -- I was specifically tasked out to DIA, Defense
09:51:58AM 5 Intelligence Agency, to locate and apprehend high value
6 targets.

7 Q. How long were you a defense contractor roughly?

8 A. Approximately 17, 17 and a half years.

9 Q. And after you stopped being a defense contractor did you
09:52:14AM 10 come over to BOP?

11 A. Yes, sir.

12 Q. Why did you stop being a defense contractor?

13 A. Actually my wife got on to me about being gone all the
14 time, you know, having to two raise two boys on her own. I
09:52:27AM 15 finally caved and came back to the United States to kind of
16 homestead.

17 Q. Now, you joined BOP what year?

18 A. 2014.

19 Q. When you first came into BOP what was your responsibility
09:52:39AM 20 and your position?

21 A. I was an officer. I had general responsibility as an
22 officer of the safety, well-being of the inmates and staff,
23 ensuring that the inmates followed policies and procedures
24 inside the institution.

09:52:51AM 25 Q. And you said you did that for how long?

1 A. Approximately four and a half years.

2 Q. Then you became -- you were promoted to SIS?

3 A. Yes, sir.

4 Q. Now, was that a competitive position, the position that
09:53:04AM 5 you obtained at SIS?

6 A. Yes, sir.

7 Q. How many SIS officers are there at FMC Lexington?

8 A. In our institution there's only two, sir.

9 Q. You're one of the two?

09:53:16AM 10 A. Yes, sir.

11 Q. Now, during the course of your work as an SIS technician,
12 do you have -- how is it that you go about, generally
13 speaking, I don't want any names, generally speaking, how is
14 it that you go about trying to find out what's going on in the
09:53:33AM 15 facility and what -- who, if any, inmates may be engaging in
16 criminal or prohibited conduct?

17 A. Generally speaking, we have certain things we have to
18 monitor daily: Inmate communications, which are e-mails,
19 phone calls, written letters, correspondence. We do that. We
09:53:54AM 20 look for key words or anything that may be an indicator of
21 something going on.

22 We walk the institution, we help the officers with
23 shakedowns or searches throughout the institution. We have
24 conversations daily with the inmates. I'm pretty good at just
09:54:09AM 25 walking up and talking to them. I like to keep a good, open

1 conversation with them.

2 We get information from other institutions, we get
3 information from other inmates. You just put it all together
4 and try to find everything.

09:54:20AM 5 Q. Fair enough. You used the term "shakedown." What's a
6 shakedown?

7 A. A search, sir.

8 Q. A search of what?

9 A. Could be a general area, could be an inmate itself, it
09:54:29AM 10 could be a cell.

11 Q. By the way, does the fact that an inmate takes many
12 classes at a Bureau of Prisons facility indicate that he's not
13 engaging in criminal or prohibited conduct?

14 A. No, sir.

09:54:50AM 15 Q. Does the fact that an inmate takes many classes at a BOP
16 facility indicate he's not a danger in the facility or could
17 be a danger outside?

18 A. No, sir.

19 Q. I want to direct your attention to February 21st of 2019.
09:55:06AM 20 On that day did you have occasion to become involved in the
21 search of cells? Prison cells?

22 A. I'm not sure of the exact date, but --

23 Q. All right. Is there anything that might refresh your
24 recollection on the date?

09:55:24AM 25 A. My affidavit or the incident report or something showing

1 that date, sir.

2 Q. Fair enough.

3 **MR. RODRIGUEZ:** Judge, I'm handing up to the witness
4 what I'm marking as Government Exhibit 1. It is the Federal
09:55:48AM 5 Bureau of Prisons incident report from February 21, 2019.

6 **MR. GLEESON:** May I see it, please? Thank you.

7 **THE COURT:** Mark it with a number.

8 **MR. RODRIGUEZ:** Sorry, Judge?

9 **THE COURT:** Do you want to mark it with a number?

09:56:09AM 10 **MR. RODRIGUEZ:** Government Exhibit 1.

11 **THE COURT:** I'm sorry, I didn't hear it. No. 1,
12 thank you.

13 **BY MR. RODRIGUEZ:**

14 Q. Mr. Wascher, I show you what's marked as

09:56:18AM 15 Government Exhibit 1. Do you recognize what that is?

16 A. Yes, sir.

17 Q. What is it?

18 A. It's an incident report, sir.

19 Q. All right. Did you prepare that incident report?

09:56:26AM 20 A. I did.

21 Q. I'd like you to review it and see if it refreshes your
22 recollection as to the date of that jail cell search?

23 A. It does, sir.

24 Q. What was the date?

09:56:34AM 25 A. 21 February 2019.

1 Q. All right. Now, at that time were you an SIS technician
2 or were you still an officer?

3 A. I was a senior officer, sir.

4 Q. All right. Can you describe to the Court generally why it
09:56:46AM 5 is you searched the cell that day?

6 A. On this occasion, sir, we were doing random cell searches
7 of the entire alley of the Bluegrass Unit where Mr. Marks
8 resides.

9 His cell was one of those on that alley, and we had
09:57:01AM 10 previous information that there may be contraband in his cell.
11 So we searched it along with the other cells.

12 Q. All right, let's break that up a little bit. You said
13 that you were conducting random searches. Is that something
14 that commonly takes place at a Bureau of Prisons facility?

09:57:13AM 15 A. It's supposed to happen daily throughout the day.

16 Q. What's the purpose of these random cell searches?

17 A. To control and eliminate contraband from the institution.

18 Q. All right. Now, you indicated that you in the course of
19 doing that set of searches, you also searched Mr. Marks' cell?

09:57:28AM 20 A. Yes, sir.

21 Q. And you had prior information about him?

22 A. Yes, sir.

23 Q. What was that information?

24 A. We were given information that Mr. Marks had in his
09:57:37AM 25 possession a SIM card, which goes into a smart telephone, and

1 he was attempting to obtain a smart telephone for that SIM
2 card.

3 Q. Did you obtain any -- had you had any information about
4 why he was trying to get a cell phone?

09:57:50AM 5 A. The information we were given was that he was trying to
6 get into -- introduction of Suboxone inside the institution,
7 and that he was currently using another inmate's cell phone to
8 coordinate this and he wanted his own cell phone to coordinate
9 it.

09:58:05AM 10 Q. What is Suboxone?

11 A. It's a prescription drug that helps people get off opiate
12 addiction.

13 Q. How is it used in any way by prison inmates?

14 A. It gives you the same feelings -- or it's just like taking
09:58:20AM 15 an opiate, and it's easy to conceal. The inmates take it.

16 Q. Forgive me for something, what may be a silly question,
17 but why is it a violation or why is it of concern that an
18 inmate might have a cell phone in his possession?

19 A. A cell phone is our most serious item in the institution.

09:58:39AM 20 Q. A more serious item?

21 A. Yes, sir. We consider those more serious than weapons.
22 They use them to coordinate activities, talk to people on the
23 outside of the institution. We've seen -- a prime example,
24 like in Puerto Rico they coordinated attacks on staff members
09:58:55AM 25 outside of the institution; that was done through cell phones.

1 So maintaining and eliminating cell phones from the
2 institution is one of our main priorities.

3 Q. Were you involved in the actual search of Mr. Marks' cell?

4 A. Yes, sir.

09:59:09AM 5 Q. At the time did Mr. Marks share the cell with anybody
6 else?

7 A. Yes, sir.

8 Q. How many people were in Mr. Marks' cell?

9 A. I believe, my recollection, there were two inmates in that
09:59:20AM 10 cell, sir.

11 Q. Do you recall the name of the other inmate?

12 A. Inmate Moore.

13 Q. Okay. Describe to Judge Larimer what happened when you
14 began the course of the search of Mr. Marks' cell.

09:59:34AM 15 A. Initially we go in the cell, we ensure no inmates were
16 present inside the cell, we'll throw a blanket or towel,
17 something over the window -- we don't want the inmates
18 observing our search procedures because then they'll know how
19 we search and it helps them hide more contraband. So we'll
09:59:50AM 20 secure the cell, cover the window. We just go in and conduct
21 a search.

22 Q. And was any contraband found during this search of the
23 cell?

24 A. Yes, sir.

09:59:58AM 25 Q. Describe to Judge Larimer what you found.

1 A. A plastic card that you receive -- that a SIM card is
2 attached to and you snap the SIM card out. We found one of
3 those.

4 Q. You found the card holder, but not the SIM card itself?

10:00:11AM 5 A. That's correct.

6 Q. And --

7 **THE COURT:** I'm sorry. You found -- tell me again
8 what you found.

9 **THE WITNESS:** Your Honor, when you get a new cell
10 phone they give you that plastic card, it looks like a credit
11 card, and it has the SIM card into it, and you kind of snap it
12 out. That card is what we found, not the actual SIM card.

13 **THE COURT:** All right. I take it that none of the --
14 neither Mr. Marks nor Mr. Moore were in the cell when it was
15 searched?

16 **THE WITNESS:** No, sir.

17 **THE COURT:** Okay.

18 **BY MR. RODRIGUEZ:**

19 Q. Had they been in the cell, you would have asked them to
20 step out?

21 A. Yes, sir.

22 Q. Okay. Where did you find the SIM card holder?

23 A. It was located inside a red Gideon Bible.

24 Q. And where was the red Gideon Bible?

10:00:54AM 25 A. It was located on top of a wall locker, institutional wall

1 locker.

2 Q. How many wall lockers were in that cell, if you recall?

3 A. I believe there were four in the cell at the time.

4 Q. Okay. And were you able -- was the Bible inside a locker
10:01:12AM 5 or on top of a locker?

6 A. It was on top of a locker.

7 Q. So anybody in that cell could have grabbed the Bible?

8 A. Yes, sir.

9 Q. Were you able to determine whose locker the Bible was on
10:01:24AM 10 top of?

11 A. Yes, sir.

12 Q. Whose locker was it?

13 A. We identified it as Inmate Moore's locker.

14 Q. Inmate Moore's locker, Mr. Marks' cellmate?

10:01:33AM 15 A. That's correct.

16 Q. What happened after you identified the Bible, you located
17 the plastic SIM card holder inside the Bible on top of the
18 locker?

19 A. We secured the contraband and continued with the search of
10:01:46AM 20 the cell.

21 Q. Did you find any other contraband?

22 A. No, sir, I don't believe we did.

23 Q. What happened after the search was completed?

24 A. We took the contraband over to the lieutenant's office and
10:01:58AM 25 we escorted Moore to the lieutenant's office as well.

1 Q. Why did you take Moore to the lieutenant's office?

2 A. Because the location of the SIM card was identified as his
3 property, so he was the only inmate we could physically link
4 to the SIM card.

10:02:15AM 5 Q. Were you present when Moore was taken to the lieutenant's
6 office?

7 A. Not during the escort. I was in the lieutenant's office
8 when he arrived there.

9 Q. All right. And was Mr. Moore asked any questions while he
10:02:28AM 10 was inside the lieutenant's office?

11 A. Yes, sir.

12 Q. What, if anything, did he say about the Bible and the SIM
13 card, if anything?

14 A. He stated it was his Bible, that he had one Bible, red
10:02:39AM 15 Bible, that he used for religious services.

16 Q. Now, what happened to Mr. Moore after he had this initial
17 communication with the lieutenant?

18 A. He was escorted to the Special Housing Unit and secured
19 there.

10:02:53AM 20 Q. Was he at some point -- I forget the term -- adjudicated
21 one way or the other, that he was guilty or not guilty of
22 possessing that contraband?

23 A. He was seen by the lieutenant and the DHO. I'm not sure
24 what their findings were on it, sir, but he was seen by both
10:03:11AM 25 of them.

1 Q. What's a DHO?

2 A. Disciplinary hearing officer.

3 Q. Did you have occasion to check to see whether there was
4 any indication of Mr. Moore's having been disciplined as a
10:03:22AM 5 result of this activity?

6 A. Yes, sir.

7 Q. What was your finding?

8 A. That he had no disciplinary history.

9 Q. What's that indicate?

10:03:29AM 10 A. It would either indicate that he was not charged with the
11 cell phone or that his record was expunged.

12 Q. Why would a record be expunged?

13 A. It could either be due to not enough evidence for the DHO
14 to substantiate the charge; or if the DHO himself felt that
10:03:43AM 15 the inmate wasn't guilty.

16 Q. All right. Now, you were involved in the search, you were
17 present when Mr. Moore was interviewed. Who do you believe
18 that SIM card belonged to?

19 A. My belief it belonged to Mr. Marks.

10:03:56AM 20 Q. Why is that?

21 A. The previous information we had, the intelligence stating
22 that he was in possession of it, he was trying to gain access
23 to a cell phone, the interactions with Mr. Marks versus the
24 interaction with Inmate Moore. Two completely different
10:04:12AM 25 personalities.

1 Q. In what way?

2 A. Inmate Moore is very, very polite, very respectful, not
3 like strong-willed at all. He's the type of inmate that if he
4 sees you in the hallway, he says God bless you or how you
10:04:28AM 5 doing, hopes you have a safe day at work, stuff like that.

6 Mr. Marks is more confident, a little bit of
7 arrogance to him, doesn't interact the same way.

8 So based on my experience, if I had to pick an
9 inmate and guess who it belonged to, I would say Mr. Marks.

10:04:45AM 10 Q. And had you had occasion -- are you familiar with
11 Mr. Marks' disciplinary record?

12 A. Slightly.

13 Q. Does he have a disciplinary history in BOP?

14 A. Yes, sir.

10:04:56AM 15 Q. Did Mr. Moore have a disciplinary history at BOP?

16 A. No, sir.

17 Q. Based on your training and experience and your work as an
18 SIS technician, why would Mr. Moore claim responsibility for
19 something that didn't -- or contraband that wasn't his?

10:05:12AM 20 A. There could be numerous reasons. Sometimes inmates will
21 hold or claim responsibility for contraband for other inmates.
22 Could be either done out of loyalty, out of fear, coercion.
23 Inmates can pay or bribe other inmates to hold contraband for
24 them.

10:05:29AM 25 Most likely your smarter, more well-connected

1 inmates are never going to hold their own contraband so they
2 won't have a significant history report for that. It will be
3 the inmates who don't have any pull or influence in the
4 institution.

10:05:42AM 5 Q. Do you consider Mr. Marks a well-connected inmate?

6 A. I'd say he's somewhat connected. He's a very intelligent
7 person, and I don't think, if he had contraband, he would hold
8 it his self.

9 Q. By the way, I forget if I asked you this, but the
10:05:58AM 10 information about somebody holding a SIM card and trying to
11 get a cell phone, who was trying to -- who was holding a SIM
12 card, who was trying to get a cell phone according to the
13 information you had obtained before the search?

14 A. According to the information, Inmate Marks had a SIM card
10:06:14AM 15 and was trying to obtain a cell phone for that SIM card.

16 Q. All right. I want to move you ahead to August of 2019 of
17 this year.

18 A. Okay.

19 Q. Around that time were you contacted by BOP lawyers and
10:06:40AM 20 asked to look into a tattoo that Mr. Marks had?

21 A. Yes, sir.

22 Q. Can you describe that communication to Judge Larimer?

23 A. I was contacted by the Legal Department at FMC Lexington.
24 They advised me that the AUSA's Department had observed a
10:06:56AM 25 tattoo on Inmate Marks on social media and asked if I could

1 get a picture of the tattoo or get an explanation of what the
2 tattoo was.

3 Q. What, if anything, did you do to follow-up that request --
4 follow-up on that request?

10:07:09AM 5 A. I just had Mr. Marks come over to the lieutenant's office,
6 talked to him a little bit and took pictures of his tattoos
7 and upper body.

8 Q. Could you describe Mr. Marks' demeanor when he came into
9 the lieutenant's office to meet with you?

10:07:22AM 10 A. He was a little nervous. Getting called to the
11 lieutenant's office, he was wanting to know if he was in
12 trouble. He was confident, a little bit arrogant. That's
13 just -- that's normally his personality, but he was a little
14 nervous being in the lieutenant's office.

10:07:37AM 15 Q. Describe to Judge Larimer what happened when Mr. Marks
16 came into the lieutenant's office.

17 A. He asked me why he was there, and I told him I needed to
18 take pictures of his upper body, he may have been involved in
19 a physical altercation. Just needed to get pictures and find
10:07:52AM 20 out what's going on.

21 He submitted. There was no issue. He didn't --
22 wasn't confrontational whatsoever.

23 Q. Did you photograph him?

24 A. Yes, sir.

10:07:59AM 25 Q. During the course of your having this meeting with him did

1 he say anything?

2 A. Yes, we had a casual conversation.

3 Q. Did he discuss at any time whether or not he had belonged
4 to any groups in facilities before?

10:08:17AM 5 A. He had mentioned that he had ran with the Dirty White Boys
6 at -- I believe it was USP Coleman.

7 Q. What did he say about that?

8 A. He said that he was used to stuff like this, being brought
9 in, accusations being made, like, for the photographs. Stuff
10:08:34AM 10 like that happened at USP Coleman.

11 He ran with the Dirty White Boys. He got tired of
12 their politics; as he got older and more mature, didn't want
13 to be involved in it. They would ask him to assault inmates
14 if they were minorities or homosexual, and as he got older he
10:08:50AM 15 realized how stupid that was and he was trying to distance his
16 self from it.

17 Q. Did he indicate whether or not he had, in fact, assaulted
18 minorities and gay people?

19 A. His words were that the Dirty White Boys had instructed
10:09:02AM 20 him to do it.

21 Q. Did he say whether or not he had done it?

22 A. He didn't say specifically he did it. He said that they
23 would ask him to do it.

24 Q. All right. Now, Mr. Wascher, do you remember roughly when
10:09:17AM 25 it was?

1 **THE COURT:** I'm sorry --

2 **MR. RODRIGUEZ:** I'm sorry, Judge.

3 **THE COURT:** Either your own knowledge or the record,
4 do you know when Mr. Marks was at Coleman?

10:09:30AM 5 **THE WITNESS:** He was there, I believe, a couple
6 years. I'm not sure the exact dates, Your Honor.

7 **THE COURT:** Just before Lexington or do you know?

8 **THE WITNESS:** I think he had been in an institution
9 prior between Coleman and us, sir. I think it was Ray Brook.
10 I'm not sure, sir.

11 **THE COURT:** All right.

12 **BY MR. RODRIGUEZ:**

13 Q. Mr. Wascher, do you remember roughly when it was that you
14 and I first spoke about Mr. Marks?

10:10:04AM 15 A. I don't remember the exact date, no. I believe it was
16 shortly after I received the e-mail from Legal.

17 Q. All right. After you had taken photographs and had this
18 meeting?

19 A. Yes, sir.

10:10:11AM 20 Q. And during that session did you discuss with me what
21 happened during your meeting with Mr. Marks?

22 A. Yes, sir.

23 Q. And did you also describe what you recall happening during
24 the search of Mr. Marks' cell earlier in the year in February?

10:10:33AM 25 A. I believe so, yes, sir.

1 Q. When you told me about what had happened during the search
2 of his cell, did you have access or were you in a position to
3 review that report when we initially talked?

4 A. Not at that time, sir.

10:10:50AM 5 Q. All right. I want to move you to one last topic that I
6 want to cover. As part of your work at SIS, do you have
7 occasion to follow the money, if you will, to determine how
8 much money is coming into inmates' accounts and whether any
9 money is going out of the inmates' accounts?

10:11:11AM 10 A. Yes, sir.

11 Q. And did you have occasion to look at Mr. Marks' account to
12 see if any money was coming in?

13 A. Yes, sir.

14 Q. And what, if anything, did you find?

10:11:24AM 15 A. I found numerous connections to dozens of other inmates
16 that were either sending or receiving money to Mr. Marks; and
17 a couple of outside contacts that were sending or receiving
18 money to Mr. Marks.

19 Q. Did you find any indication that payments were coming from
10:11:39AM 20 outside the facility in to Mr. Marks' account?

21 A. I believe there were a couple coming to him, most of them
22 were going to another individual outside the institution.

23 Q. Do you remember how many payments were coming in?

24 A. Not the number of payments, no, sir.

10:11:52AM 25 Q. Would it help to refresh your recollection by reviewing

1 your declaration?

2 A. Yes, sir.

3 **THE COURT:** So you said money was going from other
4 inmates to Mr. Marks, and there was money coming from outside
10:12:12AM 5 in to his account as well?

6 **THE WITNESS:** Yes, Your Honor.

7 **THE COURT:** All right.

8 **BY MR. RODRIGUEZ:**

9 Q. I show you what's marked as Government Exhibit 2. Can you
10:12:20AM 10 identify what this is for the record?

11 A. This is my affidavit, sir.

12 Q. The affidavit that you signed and submitted to me?

13 A. Yes, sir.

14 Q. I'd like you to --

10:12:32AM 15 **THE COURT:** That's part of the record?

16 **MR. RODRIGUEZ:** It is, Judge, it's an exhibit to my
17 sur-reply.

18 **BY MR. RODRIGUEZ:**

19 Q. I'd like you to turn to paragraph 8 of your affidavit and
10:12:45AM 20 review it and see if it refreshes your recollection.

21 A. Yes, sir.

22 Q. Now, were you able to determine how much money Mr. Marks
23 was receiving from outside the facility at the time of this
24 affidavit?

10:13:10AM 25 A. At the time, sir, but we don't have listed here the total

1 from everyone that he was receiving.

2 Q. Okay. Were you able to determine whether a Ms. Jacobi was
3 sending him funds?

4 A. Yes, sir.

10:13:23AM 5 Q. Were you able to determine how much he had received during
6 his time at FMC Lexington from Ms. Jacobi?

7 A. Yes, sir.

8 Q. How much was that?

9 **THE COURT:** I'm sorry, I didn't catch the name.

10:13:33AM 10 **MR. RODRIGUEZ:** Ms. Jacobi.

11 **THE COURT:** Jacobi.

12 **BY MR. RODRIGUEZ:**

13 Q. How much was that?

14 A. At the time of this affidavit, sir, it was \$5,400.

10:13:41AM 15 Q. \$5,400?

16 A. Yes, sir.

17 Q. Coming from Ms. Jacobi into Mr. Marks' account?

18 A. Yes, sir.

19 Q. Is that a lot of money --

10:13:50AM 20 A. Yes, sir.

21 Q. -- for an inmate to receive from outside?

22 A. Yes, sir.

23 Q. Now, you signed this affidavit on October 5, 2019?

24 A. That's correct, sir.

10:14:00AM 25 Q. And we filed our response on October 15, 2019. Did you

1 have occasion to go back and review whether additional
2 payments had been made by Ms. Jacobi to Mr. Marks' account
3 after that affidavit?

4 A. Yes, sir.

10:14:21AM 5 Q. What did you find?

6 A. I found -- I believe it was two more transactions,
7 approximately \$200 each.

8 Q. When were they?

9 A. I believe it was October 13th.

10:14:33AM 10 Q. And after that were there any more payments --

11 A. No, sir.

12 Q. -- from Ms. Jacobi?

13 A. No, sir.

14 Q. Did you also find payments from other inmates out to
10:14:43AM 15 Ms. Jacobi?

16 A. Yes, sir.

17 Q. Is it a violation of BOP rules to run a business in a BOP
18 facility?

19 A. Yes, sir.

10:14:51AM 20 Q. And do you believe this is what was going on with these
21 payments?

22 A. I believe there was some type of business going on. I'm
23 not exactly sure of the nature of the business. It had
24 something to do with preparation of legal paperwork. So, yes,
10:15:04AM 25 sir.

1 Q. But the payments stopped after we filed our papers,
2 correct?

3 A. That's correct, sir.

4 Q. I forgot to ask you something, but going back to your
10:15:47AM 5 meeting with Mr. Marks when you photographed his tattoos, do
6 you remember the exact words he said to you during that
7 meeting?

8 A. In what reference, sir?

9 Q. The exact words about the Dirty White Boys. The exact
10:16:03AM 10 words?

11 A. To my recollection, his words were that he had run with
12 the Dirty White Boys at Coleman, and that he had gotten tired
13 of the politics because he had matured and realized how stupid
14 it was; and they wanted him to assault -- or asked him to
10:16:18AM 15 assault minorities and homosexuals and as he got older he
16 realized how stupid that was, he tried to distance his self
17 from those groups.

18 Q. I show you what's marked as -- direct your attention to
19 Government Exhibit 2, the affidavit. Just with respect to
10:16:37AM 20 what he said about the beating of other inmates, take a look
21 at the last sentence of paragraph 7.

22 A. Yes, sir.

23 Q. Does that refresh your recollection as to what he told you
24 about beating up other inmates?

10:16:53AM 25 A. Yes, sir.

1 Q. What did he say?

2 A. He told me he was a member of the Dirty White Boys and he
3 beat up other inmates at the direction of gang leaders.

4 **MR. RODRIGUEZ:** Thank you, Mr. Wascher. That's all
10:17:06AM 5 I have, Judge, thanks.

6 **THE COURT:** That report is different from your
7 testimony a few minutes ago where you said he did not say
8 that? He did not admit assaulting anybody?

9 **THE WITNESS:** Yes, sir. This is the actual written
10:17:23AM 10 document. I was trying to go off memory, sir.

11 **THE COURT:** Anything else, Mr. Rodriguez?

12 **MR. RODRIGUEZ:** Nothing further, Judge. Thanks.

13 **MR. GLEESON:** May I, Judge?

14 **THE COURT:** Cross.

10:17:33AM 15 **CROSS-EXAMINATION**

16 **BY MR. GLEESON:**

17 Q. Good morning.

18 A. Good morning, sir.

19 Q. My name is John Gleason. I represent Chad Marks.

10:17:51AM 20 A. Yes, sir.

21 Q. You're an SIS technician?

22 A. That's correct, sir.

23 Q. Who's in charge, sir, of -- what should I call you?
24 Officer? What is your title?

10:18:09AM 25 A. At the institution it's -- they just call me Wascher.

1 Q. Okay.

2 A. SIS technician is kind of a long title, sir.

3 Q. I'll call you Mr. Wascher.

4 A. That's fine, sir.

10:18:18AM 5 Q. Mr. Wascher, who initiates the investigations that the SIS
6 division conducts?

7 A. It would depend on the investigation, sir.

8 Q. Okay. Sometimes it comes from inmates? It begins with
9 information from inmates?

10:18:33AM 10 A. It could start with information from inmates, yes, sir.

11 Q. Okay. And you're a technician. Who's Lieutenant Fowler?

12 A. Lieutenant Fowler was one of the lieutenants at FMC
13 Lexington.

14 Q. Okay. You said "was." He's gone?

10:18:49AM 15 A. Yes, sir. He transferred.

16 Q. He was a lieutenant in SIS?

17 A. He filled in. Currently we don't have an SIS lieutenant,
18 so they would fill in different lieutenants to cover that
19 position.

10:19:00AM 20 Q. Okay. What do you have now besides you? You said there
21 were two SIS folks.

22 A. There's myself and another technician, and then we have
23 the SIA.

24 Q. That's an agent, right?

10:19:11AM 25 A. Correct.

1 Q. The hierarchy is technician, then above that is the
2 lieutenant, above that is the agent?

3 A. That's correct, sir.

4 Q. Who is the agent at FMC Lexington?

10:19:20AM 5 A. SIA Sean Burchett.

6 Q. Spell that please.

7 A. B-U-R-C-H-E-T-T.

8 Q. Okay. Who is Richard Stump, do you know?

9 A. He is a former SIS technician.

10:19:30AM 10 Q. And was he a former SIS technician at FMC Lexington?

11 A. Yes, sir.

12 Q. He's rotated somewhere else I take it?

13 A. He's still there. He took another position, sir.

14 Q. Got it. The name Joyce Horikawa, familiar to you?

10:19:47AM 15 A. I believe she's in our Legal Department, sir.

16 Q. Yeah. Do you know if she's in the Legal Department in
17 Regional in Philadelphia?

18 A. No, sir.

19 Q. Okay. And Carlos Martinez is in the Legal Department,
10:19:53AM 20 correct?

21 A. I believe so, yes, sir.

22 Q. When you get inmate information regarding suspected
23 criminal activity of other inmates, do you make a record of
24 that?

10:20:13AM 25 A. Sometimes, sir.

1 Q. Sometimes you do, sometimes you don't?

2 A. That's correct.

3 Q. What influences when you do and when you don't?

4 A. If the information sounds credible or something that needs
10:20:22AM 5 to be looked into.

6 Q. Okay. So the stuff that you don't think is credible and
7 don't think you need looking into doesn't get recorded?

8 A. That would be correct.

9 Q. Okay. Are there any BOP records of this inmate information
10:20:47AM 10 about Chad Marks and the SIM card?

11 A. I don't believe so, sir.

12 Q. You didn't create any, right?

13 A. No, sir.

14 Q. Is that because you didn't regard that information you got
10:20:55AM 15 from the inmate as credible?

16 A. That's correct, because I wasn't an SIS technician at that
17 time, sir.

18 Q. I see. So some other SIS technician made that decision
19 not to memorialize it?

10:21:04AM 20 A. I couldn't tell you what they decided, but --

21 Q. -- but, in any event, it wasn't memorialized, right?

22 A. That's correct.

23 Q. Nothing in the BOP files about this, right?

24 A. I have no idea, sir.

10:21:13AM 25 Q. You looked, didn't you?

1 A. I can't tell you what's in all the BOP files, sir.

2 Q. Did you look in the files of FMC Lexington to see if
3 there's anything in the files regarding the SIM card
4 allegations by other inmates against Chad Marks?

10:21:28AM 5 A. No, sir.

6 Q. You never looked?

7 A. No.

8 Q. But you know there's not -- it's not there, right?

9 A. No, I don't.

10:21:33AM 10 Q. I thought you testified a moment ago there's nothing in
11 the file about it?

12 A. You asked me if there were anything in all the BOP files,
13 and I said I couldn't tell you that.

14 Q. Is there anything in the FMC Lexington file?

10:21:44AM 15 A. Not to my knowledge.

16 Q. Did you look?

17 A. I haven't looked for that specifically, sir.

18 Q. Did you look at the files at FMC Lexington for information
19 about reported criminal activity by Chad Marks?

10:21:59AM 20 A. Yes.

21 Q. Is there a single piece of paper in those files that
22 records such information?

23 A. Which information?

24 **MR. RODRIGUEZ:** Objection. What information?

10:22:08AM 25 **BY MR. GLEESON:**

1 Q. Any information about criminal activity.

2 A. Yes, sir.

3 Q. What?

4 A. There's numerous entries about him trying to introduce

10:22:15AM 5 Suboxone; being involved in altercations and fights.

6 Q. How about SIM cards?

7 A. No, sir.

8 Q. Nothing, right?

9 A. No, sir.

10:22:25AM 10 Q. Okay. Now, the technicians support the lieutenant and the
11 agents, correct?

12 A. The SIS lieutenant?

13 Q. SIS.

14 A. Yes, sir.

10:22:34AM 15 Q. You write reports?

16 A. Yes, sir.

17 Q. Okay. You maintain evidence, correct?

18 A. Correct.

19 Q. Provide some computer support?

10:22:42AM 20 A. Yes, sir.

21 Q. Okay. Do you keep track of the Bureau of Prisons "public
22 safety factor"?

23 A. Yes, sir.

24 Q. They effect prison security, correct?

10:22:51AM 25 A. That's correct.

1 Q. They effect placement within the BOP system, correct?

2 A. Yes, sir.

3 Q. There's a bunch of public safety factors, right?

4 A. Yes.

10:22:59AM 5 Q. A sex offender is one, right?

6 A. Yes, sir.

7 Q. Deportable aliens another, right?

8 A. Yes, sir.

9 Q. And one is called "disruptive group," correct?

10:23:09AM 10 A. Yes, sir.

11 Q. Is the Dirty White Boys a disruptive group?

12 A. No, sir.

13 Q. Okay. So if someone were in the Dirty White Boys, that
14 wouldn't be a public safety factor, correct?

10:23:20AM 15 A. Yes, sir.

16 Q. Did you get training when you were promoted from being a
17 corrections officer to an SIS technician? Did you get
18 training?

19 A. Yes, sir.

10:23:34AM 20 Q. Do you get training on creating reports?

21 A. Yes, sir.

22 Q. Okay. You wrote up BOP incident reports like the one that
23 you saw here today when you were a corrections officer,
24 correct?

10:23:45AM 25 A. That's correct, sir.

1 Q. Okay. Is it important that they be accurate?

2 A. Yes, sir.

3 Q. Important they be truthful?

4 A. Yes, sir.

10:23:51AM 5 Q. Complete?

6 A. As complete as possible, sir.

7 Q. All right. Record the facts that are important to the
8 incident and the investigation?

9 A. Yes, sir.

10:24:06AM 10 Q. Okay. Marks arrived at FMC Lexington in January of 2019,
11 correct?

12 A. I'm not sure of the exact date, sir.

13 Q. Sound about right?

14 A. It does.

10:24:15AM 15 Q. Okay. Came from Ray Brook as far as you recall?

16 A. I don't believe -- I don't know the exact location. I
17 believe it was Ray Brook.

18 Q. Okay. Does it refresh your recollection that you told AUSA
19 Martinez (sic) a few times that --

10:24:30AM 20 **MR. RODRIGUEZ:** Rodriguez.

21 **MR. GLEESON:** I'm sorry, excuse me, Rodriguez,
22 excuse me, sir.

23 **BY MR. GLEESON:**

24 Q. Does it refresh your recollection that you told him or let
10:24:38AM 25 me -- withdrawn.

1 Do you recall telling him during your information
2 exchanges in this case that Mr. Marks was in a federal
3 penitentiary in Coleman from roughly September of 2011 to
4 January of 2013? Do you recall that?

10:25:02AM 5 A. Probably, yes, sir.

6 Q. Sounds right?

7 A. Yes, sir.

8 Q. Okay. Do you know that you're here in connection with a
9 motion by Chad Marks to reduce his sentence?

10:25:14AM 10 A. Yes, sir.

11 Q. Okay. When did you first find that out approximately?

12 A. I discussed it with AUSA Martinez (sic).

13 **MR. RODRIGUEZ:** Rodriguez.

14 **THE WITNESS:** Rodriguez.

10:25:25AM 15 **MR. GLEESON:** Sorry. I started something here.

16 **BY MR. GLEESON:**

17 Q. Did he show you the opposition that he filed in
18 August after your conversations?

19 A. I don't believe so.

10:25:37AM 20 Q. Have you ever seen it?

21 A. I don't believe so.

22 Q. Well, let me show it to you. I'm going to mark this
23 Defense Exhibit 2.

24 Ms. Taney, can I trouble you for a copy for the
10:25:59AM 25 Court and one for the AUSA, whose name I won't get wrong

1 again?

2 **THE COURT:** Why don't we use letters -- A, B, C and
3 so forth.

4 **MR. GLEESON:** Fair enough.

10:26:21AM 5 **BY MR. GLEESON:**

6 Q. This will be Defense A.

7 A. Thank you.

8 **MR. GLEESON:** Can I hand one up to the Court?

9 **THE COURT:** Sure. So this is Exhibit A, this is
10 the --

11 **MR. GLEESON:** This is the opposition filed by the
12 Government.

13 **BY MR. GLEESON:**

14 Q. You have it before you, sir?

10:26:50AM 15 A. I do, sir.

16 Q. You see at the top the date is -- I'll represent to you,
17 but you see at the top of the document it's filed August 23rd
18 of 2019?

19 A. I do, sir.

10:27:01AM 20 Q. And do you recall speaking to AUSA Rodriguez on that date?

21 A. I don't recall specific dates. I know I talked to him in
22 August.

23 Q. I want to invite your attention to page 16 because it
24 relates to the information you've imparted to the Court here
10:27:24AM 25 today. And when you get to page 16, there's two full

1 paragraphs, the second sentence of the first paragraph says --
2 excuse me, of the second paragraph --

3 A. Yes, sir.

4 Q. -- "as recently as this year after his transfer to FMC
10:27:44AM 5 Lexington in January, the SIS learned that Marks was violating
6 prison contraband rules by attempting to obtain a cell phone
7 and by possessing a SIM card. Based on that information,
8 officers searched Marks' cell and located inside Marks' Bible
9 a plastic card that SIM cards come in, but with the SIM card
10 removed."

11 Do you see that?

12 A. I do, sir.

13 Q. You don't recall if you spoke to AUSA --

14 **MR. RODRIGUEZ:** Rodriguez.

10:28:28AM 15 **BY MR. GLEESON:**

16 Q. -- Rodriguez that morning?

17 A. I don't recall the exact dates, no, sir.

18 Q. I'm going to show you Defense Exhibit B, which I'll
19 represent to you is a cover letter and a bunch of e-mails
10:28:43AM 20 supplied to the Government by AUSA Rodriguez. Fair enough?

21 A. Yes, sir.

22 **MR. RODRIGUEZ:** Can I take a quick look?

23 **MR. GLEESON:** Yes, I've got a copy for you.

24 **THE WITNESS:** Thank you, sir.

10:29:25AM 25 **BY MR. GLEESON:**

1 Q. And if you look -- and, again, these were e-mails supplied
2 to me by the Assistant U.S. Attorney. If you look to page 27,
3 look at the bottom, it says e-mails. If you turn to 27 --

4 **THE COURT:** Page 27, that's the Bates number?

10:29:55AM 5 **MR. GLEESON:** Yes, at the bottom, Judge, where it
6 says e-mail 27 in bold in the lower left-hand corner.

7 **THE COURT:** Thank you.

8 **BY MR. GLEESON:**

9 Q. See that on August 23rd at 7:37 a.m. Mr. Rodriguez
10:30:11AM 10 introduced himself as a federal prosecutor here in Rochester,
11 said he wanted to talk to you about Chad Marks.

12 You see that, sir?

13 A. Yes, sir.

14 Q. Does that refresh your recollection that you spoke to him
10:30:21AM 15 on that day?

16 A. It's here, sir. Like I said, I still don't remember it
17 personally, but it's here.

18 Q. All right. If you turn to page 28, you see that later
19 that morning, 8:26 a.m., this is the top of e-mail 28, you
10:30:40AM 20 sent an e-mail to Mr. Rodriguez attaching four photos of Chad
21 Marks?

22 A. Yes, sir.

23 Q. Okay. And you also on page -- back on page 27, you send
24 him an e-mail -- this is at the top -- informing him that
10:30:59AM 25 Marks was at Coleman from September 1 of 2011 to January 15th

1 of 2013.

2 A. Yes, sir.

3 Q. You see that?

4 A. Yes, sir.

10:31:07AM 5 Q. And fair to say you communicated with him on that day?

6 A. Yes, sir.

7 Q. You communicated with him by phone as well, correct?

8 A. I don't recall, sir. I know I communicated by e-mail, but
9 I don't recall if I talked to him on the phone.

10:31:23AM 10 Q. You don't recall talking to him on the phone?

11 A. I don't recall, no, sir.

12 Q. Okay. You gave him information to use in opposition to
13 the motion, correct?

14 A. I gave him the information that was requested, sir.

10:31:41AM 15 Q. Okay. If I can refer you back to the memo that I showed
16 you, which is Defense Exhibit A, page 16, which says that
17 officers searched Marks' cell and located inside Marks' Bible
18 a plastic card that SIM cards come in.

19 You'll agree with me the statement that the
10:32:05AM 20 officers located this plastic case inside Marks' Bible is
21 false, correct?

22 A. It's incorrect, yes, sir.

23 Q. It was Moore's Bible, correct?

24 A. Moore claimed possession of the Bible, yes.

10:32:16AM 25 Q. Excuse me. It was Moore's Bible, correct?

1 **MR. RODRIGUEZ:** Objection.

2 **THE COURT:** What's the question, Mr. Gleeson?

3 **BY MR. GLEESON:**

4 Q. It was Moore's Bible, right?

10:32:27AM 5 A. Sir, Moore claimed possession of the Bible.

6 Q. Do you have any reason to doubt that it was Moore's Bible?

7 A. That the Bible belonged to Moore? I do not.

8 Q. It was on top of his locker?

9 A. Yes, sir.

10:32:36AM 10 Q. He was examined about it?

11 A. Yes, sir.

12 Q. In a lieutenant's office?

13 A. Yes, sir.

14 Q. He said it was his Bible?

10:32:42AM 15 A. That's correct.

16 Q. In that locker were Moore's possessions?

17 A. That's correct.

18 Q. Did you tell AUSA Rodriguez that the SIM card was seized
19 from Marks' Bible?

10:32:56AM 20 A. I believe I did initially, yes, sir.

21 Q. And that was wrong?

22 A. Yes, it was incorrect.

23 Q. Okay. Did you tell him that the Bible belonged to Thomas
24 Moore?

10:33:06AM 25 A. Not during this phone conversation, no, sir.

1 Q. And did you tell him in that conversation that Moore and
2 not Marks was charged with possessing this piece of plastic
3 that you say contained a SIM card?

4 A. No, sir.

10:33:24AM 5 Q. In fact, you yourself wrote up the incident report
6 charging Moore, right?

7 A. That is correct.

8 Q. And Moore ended up in the SHU, right?

9 A. The Special Housing Unit, yes, sir.

10:33:32AM 10 Q. Marks was never charged, right?

11 A. That is correct.

12 Q. Marks was never disciplined, right?

13 A. That is correct.

14 Q. He was never even asked about that, right?

10:33:41AM 15 A. I don't believe so, sir.

16 Q. Did you tell the AUSA that?

17 A. Not --

18 **MR. RODRIGUEZ:** I'm going to object to the form of
19 the question.

10:33:48AM 20 **THE COURT:** Overruled.

21 **BY MR. GLEESON:**

22 Q. Did you tell the AUSA that?

23 A. Not during this initial conversation.

24 Q. Did you think it important that the AUSA tell the Court
10:33:57AM 25 that someone else was punished for this SIM card?

1 A. Did I think? I don't understand what you mean, sir.

2 Q. Did you think it important when you were speaking to AUSA
3 Rodriguez that the Court should know that someone else was
4 charged with possessing the SIM card?

10:34:16AM 5 A. At this time I had no idea what was going on, sir.

6 Q. I'm asking you whether you thought it was important?

7 A. I can't answer that question, sir.

8 Q. Did you think it was important to tell the Court that
9 Marks was not charged with it, but Moore was?

10:34:30AM 10 A. At what time, sir?

11 Q. At that time, August 23rd, 2019.

12 A. Sir, at this time I provided the information in my memory.
13 I wasn't -- I didn't look at any documentation, I didn't
14 refresh my memory. That was the memory I had.

10:34:43AM 15 Q. You'll agree, won't you, that this brief that I drew your
16 attention to makes it look like the BOP found evidence of
17 contraband in Marks' Bible, correct?

18 A. Yes, sir, that statement does.

19 Q. And that wasn't true, right?

10:34:58AM 20 A. That's an incorrect statement, yes, sir.

21 Q. Did AUSA Rodriguez ask you for a copy of the incident
22 report?

23 A. Yes, sir.

24 Q. Did you send it to him on August 23rd?

10:35:14AM 25 A. I can't recall if I sent it to him or if Legal pulled it

1 from the files. I can't remember which one happened, sir.

2 Q. Do you know whether he had it before he wrote this
3 memorandum to the Court?

4 A. I have no idea.

10:35:24AM 5 Q. In any event, AUSA Rodriguez eventually came back to
6 you -- withdrawn.

7 Did you learn that we, Chad Marks' lawyers, told
8 the Court that there were false and misleading statements in
9 this memorandum that I've shown you?

10:36:05AM 10 **MR. RODRIGUEZ:** Object to the form of the question.

11 **THE WITNESS:** I don't understand your question.

12 **THE COURT:** Overruled.

13 **BY MR. GLEESON:**

14 Q. Did you learn that Chad Marks' lawyers told the Court that
10:36:16AM 15 this memorandum that I've shown you, and specifically those
16 statements that I read to you, were false and misleading?

17 A. Did I learn that you said that to the Court?

18 Q. Yes.

19 A. No.

10:36:28AM 20 Q. Okay. In any event, AUSA Rodriguez came back to you and
21 asked you to file -- to write a declaration, correct?

22 A. That's correct, sir.

23 Q. Okay. Let's turn to that declaration, which I think you
24 might have up there.

10:36:43AM 25 Did you mark that, Mr. Rodriguez?

1 **MR. RODRIGUEZ:** No. 1, I believe. No. 2, No. 2.

2 **THE COURT:** Exhibit 2.

3 **MR. GLEESON:** Ms. Taney, do you have extra copies of
4 that? This is Government Exhibit 2.

10:37:12AM 5 **BY MR. GLEESON:**

6 Q. You still have it in front of you, sir?

7 A. Yes, sir.

8 Q. At paragraph 3 you wrote that after Marks arrived at FMC
9 Lexington, SIS, other corrections officers and I obtained
10 information from inmates in the facility that Marks was
11 violating prison contraband rules by attempting to obtain a
12 cell phone and by actually possessing a SIM card, right?

13 I read that correctly?

14 A. That's correct, sir.

10:38:00AM 15 Q. Okay. Now, you say "SIS, other corrections officers and
16 I." Did all three of you obtain that information
17 independently?

18 A. That's more than three. It's multiple corrections
19 officers, the SIS department, several lieutenants.

10:38:17AM 20 Q. So SIS got that information, right?

21 A. Yes, sir.

22 Q. And do you know who in SIS got it?

23 A. At that time the SIS technicians would have been Mr. Stump
24 and Mr. Lawson.

10:38:29AM 25 Q. Okay. And so they received information -- this information

1 you claim, correct?

2 A. Yes, sir.

3 Q. And then multiple corrections officers?

4 A. Yes, sir.

10:38:39AM 5 Q. Okay. And do you know who they are?

6 A. I can't tell you all of them, sir. I know myself, Officer
7 Hacker, Officer Vago. There's quite a few of us that
8 regularly conduct searches and interact with the inmates.

9 Q. Okay. Then you --

10:38:53AM 10 A. Yes, sir.

11 Q. -- also?

12 A. Also myself.

13 Q. So multiple sources of information, correct?

14 A. That is correct, sir.

10:38:59AM 15 Q. Okay. And the incident -- you testified earlier that there
16 was -- the search occurred on February 21st, correct?

17 A. I believe that was correct, sir.

18 Q. And you have before you, the Government marked it, I
19 believe, the incident report. You have it up there, right?

10:39:20AM 20 A. Yes, sir.

21 Q. Government Exhibit 1?

22 A. Yes, sir.

23 Q. Okay. Who decided to search the cell?

24 A. That particular cell?

10:39:32AM 25 Q. Yes.

1 A. We searched it. It was on the alley that we were
2 searching other cells.

3 Q. And who made the decision to search the cell?

4 A. I can't recall that, sir.

10:39:41AM 5 Q. There a process that, you know, out here, outside of
6 prisons, there's a process for conducting a search where
7 authority is obtained from a judge. Is there anything
8 analogous to that in the BOP setting where someone's authority
9 is obtained to search?

10:40:01AM 10 A. Whose authority, sir?

11 Q. Anyone.

12 A. You mean like an inmate's authority to search?

13 Q. Yeah, I mean, it may be true -- and you're going to edify
14 me in this regard -- that an SIS technician can just decide to
10:40:13AM 15 search a cell on his or her own; is that correct?

16 A. An officer can search an inmate's person, property,
17 assignments at any time he decides. So if an officer can do
18 it, anyone from an officer to staff member to SIS to
19 lieutenant to the warden himself can do it, sir.

10:40:29AM 20 Q. Okay. In this case this search on February 21st, do you
21 remember specifically who authorized the search?

22 A. I just said I don't remember that, sir.

23 Q. Okay. In any event, if you look at Government Exhibit 1,
24 which is the incident report, it says -- and I'll invite your
10:40:55AM 25 attention to paragraph 11, which is the description of the

1 incident -- "on Thursday 21 February 2019 at approximately
2 10:40 p.m. I, SCO S. Wascher, was conducting random cell
3 searches in the Bluegrass Unit," correct?

4 A. That's what it says, sir, yes.

10:41:30AM 5 Q. Okay. Is that correct?

6 A. That is correct.

7 Q. Okay. And you also testified and you wrote in your
8 declaration that the basis for the search was this suspicion
9 that Chad Marks possessed a SIM card, correct?

10:41:47AM 10 A. For that particular cell, yes, sir.

11 Q. Excuse me?

12 A. For that particular cell, yes, sir.

13 Q. But you didn't write that in the incident report, correct?

14 A. No, sir.

10:41:58AM 15 Q. The incident report says that this was a random search,
16 this was pursuant to a random search of all the cells in the
17 Bluegrass Unit, correct?

18 A. That's not what it says, sir.

19 Q. Well, it says conducting random cell searches of the
10:42:13AM 20 Bluegrass Unit, correct?

21 A. That is correct.

22 Q. And there's nothing in here that suggests that the purpose
23 of the search of this cell was other information about Chad
24 Marks, is there?

10:42:24AM 25 A. No, there is not.

1 Q. And is that written anywhere?

2 A. I don't believe so, sir.

3 Q. Other than your declaration?

4 A. I don't believe so.

10:42:31AM 5 Q. Isn't it a fact that the basis of the search was this
6 random search and not information supplied by other inmates?

7 A. Of which part of the search, sir?

8 Q. Of the search of Chad Marks' cell.

9 A. The initial search was a random search of that alley.

10:42:52AM 10 When we got to his cell, we had prior information about
11 Inmate Marks, so we decided to include his cell into that
12 search.

13 Q. Why didn't you put that reason in this incident report?

14 A. Incident report is supposed to be factual information,
10:43:04AM 15 sir, not what I believed or what I thought. It's factual
16 information about what occurred at that time.

17 Q. And the factual information you're testifying to here
18 today is that the reason for the search was suspicion of Chad
19 Marks, correct?

10:43:20AM 20 A. The reason of the search was suspicion that Chad Marks may
21 have in his possession contraband.

22 Q. And that's factual information, correct?

23 A. Yes, sir.

24 Q. And the purpose set forth here was to conduct a random
10:43:33AM 25 search, correct?

1 A. It doesn't say random search of Inmate Marks' cell, sir.
2 It says of the Bluegrass Unit.

3 Q. Would you agree with me that the statement that Wascher
4 was conducting random cell searches of the Bluegrass Unit is a
10:43:47AM 5 factual assertion?

6 A. Yes, sir.

7 Q. And that factual assertion is different from the one
8 you're including here is the purpose of your search, right?

9 A. For Inmate Marks' cell or for the Bluegrass Unit, sir?

10:44:00AM 10 Q. You tell me.

11 **MR. RODRIGUEZ:** Object to the form.

12 **THE WITNESS:** I did tell you, sir. It was a random
13 search of the Bluegrass Unit of that alley. When we came upon
14 Marks' cell, we had prior information he may be in possession
10:44:10AM 15 of contraband. So we decided to include that cell as well.

16 **BY MR. GLEESON:**

17 Q. Your testimony is the search of his cell was pursuant to
18 an investigation of Chad Marks, correct?

19 A. No, I never said that.

10:44:23AM 20 Q. But it was based on information that he had a SIM card,
21 right?

22 A. Yes.

23 Q. There is -- just to cut to one chase with respect to this
24 incident report -- the name Chad doesn't appear anywhere in
10:44:35AM 25 the report, right?

1 A. Which report, sir?

2 Q. Your incident report that's in front of you.

3 A. No, sir.

4 Q. The name Marks doesn't, correct?

10:44:42AM 5 A. No, sir.

6 Q. What was the reason you didn't place on this incident
7 report that the basis for the search of this particular cell
8 included information about Marks?

9 **MR. RODRIGUEZ:** Objection, asked and answered.

10:45:12AM 10 **THE COURT:** Overruled. It's cross-examination.

11 **THE WITNESS:** As stated earlier, I only put the
12 factual information about what occurred in that cell. I
13 wasn't putting my opinions or what I believed or what I
14 thought happened. I was putting the factual information about
10:45:25AM 15 what happened during that search and what we found in the
16 cell.

17 **BY MR. GLEESON:**

18 Q. You wrote in your declaration in October that I and other
19 officers believed that the plastic SIM card belonged to Chad
10:45:40AM 20 Marks. Do you recall that, sir?

21 A. Yes, sir.

22 Q. Okay. Did you believe that at the time the plastic was
23 seized?

24 A. At the time we located it?

10:45:47AM 25 Q. Yes.

1 A. Yes, sir.

2 Q. Okay. And you based your belief on your claim that it's
3 common -- withdrawn.

4 Did you say on direct examination that if you had
10:46:08AM 5 to guess whether Moore was coerced, you would say he was
6 because Chad Marks is arrogant?

7 A. I did not say that at all, sir.

8 Q. You based your belief of your claim that this is -- you
9 based your belief that this was Marks' SIM card on your claim
10:46:31AM 10 that it's common in BOP facilities that stronger or more
11 connected inmates coerce weaker and less connected ones; is
12 that correct?

13 A. That's not what I said either, sir.

14 Q. Could you look at your declaration that's before you,
10:46:47AM 15 paragraph 5? Second sentence of paragraph 5 you wrote "it is
16 common in BOP facilities that stronger or more connected
17 inmates coerce weaker or less connected cellmates."

18 You wrote that, right?

19 A. Yes, sir.

10:47:19AM 20 Q. Isn't that, sir, didn't you just say to the Court in this
21 declaration that the basis of your belief that the SIM card,
22 that plastic -- withdrawn.

23 Am I understanding it correctly that your
24 declaration attributes your belief that Marks coerced Moore to
10:47:44AM 25 this common phenomenon in BOP?

1 **MR. RODRIGUEZ:** Object to the form of the question.

2 **BY MR. GLEESON:**

3 Q. Do you understand my question?

4 **THE COURT:** Overruled.

10:47:53AM 5 **THE WITNESS:** Common phenomenon, sir?

6 **BY MR. GLEESON:**

7 Q. It is common -- I'm reading from your declaration.

8 A. Yes, sir.

9 Q. "It's common in BOP facilities that stronger or more
10:48:04AM 10 connected inmates coerce weaker or less connected cellmates,"
11 right? I read that correctly?

12 A. Yes, sir.

13 Q. That's one of the bases of your belief that this was
14 actually Marks' plastic and not Moore's; is that correct?

10:48:19AM 15 A. Are you talking about at the time of this affidavit or at
16 the time of the search, sir?

17 Q. Well, let's separate it. At the time of the search?

18 A. At the time of the search I had no reason to believe that
19 Mr. Marks had intimidated or coerced anyone.

10:48:33AM 20 Q. All right.

21 A. I was following up on information.

22 Q. So at the time you wrote the affidavit you thought -- you
23 wrote the declaration, okay.

24 And you also based it on the fact that if
10:48:44AM 25 contraband is discovered -- I'm paraphrasing from your

1 declaration -- a stronger inmate coerces the cellmate to take
2 responsibility, correct?

3 A. That's very common, yes, sir.

4 Q. And Moore had no history of disciplinary violations?

10:48:57AM 5 A. None.

6 Q. And based on that you concluded that Marks coerced Moore
7 into holding the plastic card, correct?

8 A. I believe he could have, yes, sir.

9 Q. That he could have?

10:49:07AM 10 A. Yes, sir.

11 Q. Okay. And is that what you told AUSA Rodriguez, that he
12 could have?

13 A. It's written here is that he did, but yes, I believe he
14 could have.

10:49:17AM 15 Q. Which is it, did or could have?

16 A. Both, sir.

17 Q. Okay. On the night of the search Moore was taken to the
18 lieutenant's office to be questioned, correct?

19 A. That is correct, sir.

10:49:31AM 20 Q. And the incident report describes the questioning, right?

21 A. I don't believe so, sir.

22 Q. Well, let me invite your attention back to Government
23 Exhibit 1, paragraph 11. It has a long single spaced
24 paragraph that describes the information that Moore imparted
10:49:53AM 25 in the lieutenant's office, correct?

1 A. Yes, sir.

2 Q. And this is obviously based on an interrogation of Moore,
3 right?

4 A. We don't interrogate inmates, sir.

10:50:01AM 5 Q. What do you call it?

6 A. Interviews.

7 Q. Sorry?

8 A. An interview.

9 Q. Based on an interview of Moore?

10:50:06AM 10 A. It's based on it, yes, sir.

11 Q. And the interview includes asking questions of Moore?

12 A. It does.

13 Q. Okay. So he was asked whether it was his Bible, right?

14 A. Yes, sir.

10:50:15AM 15 Q. Asked whether he had other Bibles?

16 A. I believe so, sir.

17 Q. He was asked what he used the Bible for, correct?

18 A. Yes, sir.

19 Q. Okay. Where he kept it?

10:50:26AM 20 A. Yes, sir.

21 Q. Okay. You now say that Moore was being coerced by Marks to
22 take the fall, correct?

23 A. Yes, sir.

24 Q. Okay. And you knew then, so you say, you knew then there
10:50:40AM 25 was informant information that -- or inmate information that

1 Marks was trying to possess a SIM card, correct?

2 A. Yes, sir.

3 Q. Okay. But there's nothing in here about Marks in this
4 incident report, correct?

10:50:56AM 5 A. That's correct, sir.

6 Q. There's no indication in here whatsoever of any suspicion
7 that the SIM card was Marks', right?

8 A. That's correct, sir.

9 Q. Okay. Was he questioned about whether it was Marks' SIM
10:51:11AM 10 card?

11 A. I don't believe he was asked if it was specifically Marks'
12 SIM card.

13 Q. Did you ask him, "is this Marks' SIM card?"

14 A. I didn't ask him anything, sir.

10:51:19AM 15 Q. Who did the questioning?

16 A. Lieutenant Burchett.

17 Q. Were you present?

18 A. Yes, sir.

19 Q. Okay. Did anybody ask him whether Marks was the owner of
10:51:27AM 20 this SIM card holder?

21 A. I don't recall whether he asked him or not.

22 Q. Isn't it a fact it wasn't asked at all?

23 A. I can't say it was a fact, sir, because I told you I don't
24 remember.

10:51:35AM 25 Q. And your testimony is that the search of that cell was

1 based on a suspicion that Marks was trying to possess a SIM
2 card, right?

3 A. Yes, sir.

4 Q. And there was no questioning of Moore about whether Marks
10:51:51AM 5 was the person responsible for the SIM card holder, isn't that
6 a fact?

7 A. Sir, I've already answered that. I can't remember.

8 Q. And that would have been important to your investigation,
9 right?

10:52:00AM 10 A. I didn't have an investigation, sir.

11 Q. That would be important to the investigation of the SIM
12 card, the attempt to hold a SIM card, wouldn't it, sir?

13 A. There was no investigation, sir.

14 Q. When the SIM card holder was found and Moore was
10:52:18AM 15 questioned, there was no investigation as to whether Chad
16 Marks was responsible for the SIM card?

17 A. No, sir.

18 Q. None?

19 A. No, sir.

10:52:30AM 20 Q. I thought you testified that was the purpose of the search
21 of that cell?

22 A. No, sir. I testified that the purpose of the search of
23 that cell was that we had previous information. There was no
24 open investigation on Inmate Marks.

10:52:48AM 25 Q. You had previous information of what?

1 A. As I stated earlier, that he had possession of a SIM card
2 and was trying to obtain a telephone.

3 Q. That was the purpose of the search of the cell, correct?

4 A. Yes, sir.

10:53:00AM 5 Q. And what you say was a SIM card holder was retrieved? Was
6 seized, correct?

7 A. Correct.

8 Q. And Moore was questioned, interviewed about that as you
9 say, correct?

10:53:13AM 10 A. That's correct.

11 Q. And nobody thought to question him as to whether Marks had
12 any connection to the SIM card holder?

13 A. I can't remember the exact questions that were answered,
14 sir. I didn't --

10:53:26AM 15 Q. I'm not asking you the exact questions. I'm asking you
16 whether or not in those circumstances there was no -- whether
17 there was any suspicion of Marks in the questioning --
18 withdrawn, bad question.

19 This was your summary of the interview of Moore,
10:53:40AM 20 correct?

21 A. Correct, sir.

22 Q. You said on direct in response to AUSA Rodriguez's
23 question why Moore was brought to the lieutenant's office,
24 correct?

10:54:08AM 25 A. Correct, sir.

1 Q. And you said it was because the location of the SIM card
2 identified as his property, correct?

3 A. It was among his other personal possessions, so it was
4 linked to him, yes, sir.

10:54:24AM 5 Q. It was on top of a locker, right?

6 A. Yes, sir.

7 Q. Okay.

8 **THE COURT:** We've been proceeding a while, maybe
9 this would be a time to take a break.

10:54:39AM 10 **MR. GLEESON:** Fine, Judge. Thank you.

11 **THE COURT:** All right, take about a ten minute
12 break, give the court reporter some relief. Thank you.

13 (WHEREUPON, there was a pause in the proceeding.)

14 (WHEREUPON, the defendant is present).

11:12:09AM 15 **THE COURT:** We'll continue with --

16 **MR. GLEESON:** Can I continue, Judge?

17 **THE COURT:** -- with cross-examination, and maybe try
18 to bring this area to some conclusion here.

19 **MR. GLEESON:** I'm already moving on, Judge.

11:12:37AM 20 **BY MR. GLEESON:**

21 Q. Do you recall that in early August Mr. Martinez -- Mr.
22 Martinez, to set the stage again, is an attorney at FMC
23 Lexington, correct?

24 **THE COURT:** Mr. Rodriguez.

11:12:53AM 25 **MR. GLEESON:** Mr. Martinez is an attorney at FMC --

1 **MR. RODRIGUEZ:** Another Martinez.

2 **THE WITNESS:** Yes, sir.

3 **MR. RODRIGUEZ:** His name is probably Rodriguez as
4 well.

11:13:02AM 5 **MR. GLEESON:** Source of my confusion.

6 **THE COURT:** I'm sorry.

7 **BY MR. GLEESON:**

8 Q. Did you learn that he passed along a request to SIS from
9 Regional about Chad Marks?

11:13:16AM 10 A. Are you referring to the photographs, sir?

11 Q. No. Earlier in August.

12 A. You'd have to clarify, sir. I'm not sure what you're
13 asking.

14 Q. Sure, let's take a look at the e-mails which we've marked
11:13:32AM 15 as Defense Exhibit B, and let me invite your attention to page
16 48. At the top you see an e-mail from you -- see Mr. Stump,
17 Mr. Stump at the time was an SIS technician at FMC Lexington,
18 right?

19 A. That's correct, sir.

11:14:02AM 20 Q. Okay. And actually look at the bottom. You see on
21 August 5th Mr. Stump writes an e-mail saying I spoke with
22 Mrs. Horikawa and supplied the information she requested.

23 You see that?

24 A. I do, sir.

11:14:18AM 25 Q. Did you have any involvement in this?

1 A. Not to my knowledge, sir.

2 Q. You know Horikawa is a Regional -- an attorney in
3 Regional, correct?

4 A. I know she's in Legal for the Bureau. I'm not sure of her
11:14:31AM 5 exact position, sir.

6 Q. Okay. Look on page 48. You can see Horikawa, the attorney
7 for BOP, asked Martinez, the attorney at FMC Lexington, to see
8 if Marks had any SIS information linking him to criminal or
9 bad activity.

11:14:59AM 10 Do you see that, sir?

11 A. Down at the bottom of the page, sir?

12 Q. Yes. See that?

13 A. Yes, sir.

14 Q. That's August 2nd, correct?

11:15:13AM 15 **MR. RODRIGUEZ:** Objection.

16 **BY MR. GLEESON:**

17 Q. According to the e-mail.

18 A. According to the e-mail, yes, sir, August 2nd.

19 Q. Okay. And we just read that, an e-mail pursuant to
11:15:23AM 20 which -- not pursuant to which. An e-mail stating that Stump
21 supplied that information to Horikawa on August 5th.

22 You saw that?

23 A. I'm not sure what he's supplying. He said I spoke with
24 Ms. Horikawa and supplied the information.

11:15:38AM 25 Q. That's my question. What information was that?

1 A. I have no idea, sir.

2 Q. Were you in SIS then?

3 A. I was.

4 Q. Did you confer with Stump then?

11:15:46AM 5 A. No.

6 Q. Did you confer with Horikawa then?

7 A. No.

8 Q. Do you know what information was supplied by SIS to
9 Regional in response to the Government's request?

11:15:56AM 10 A. As stated, sir, I have no idea what it was.

11 Q. Do you know we requested that?

12 A. No.

13 Q. Okay. You know it was refused?

14 A. No, sir.

11:16:02AM 15 Q. In any event, you weren't involved in that?

16 A. No, sir.

17 Q. So the information in the SIS files about Chad Marks was
18 supplied by one of your colleagues, Stump, correct?

19 **MR. RODRIGUEZ:** Objection. He said he didn't know,
11:16:16AM 20 Judge.

21 **THE WITNESS:** According to the e-mail, it shows
22 Mr. Stump, but I'm not sure.

23 **BY MR. GLEESON:**

24 Q. All right. In any event, a couple weeks later you were
11:16:25AM 25 asked to perform a particular task, right?

1 A. I'm not sure. Again, the exact date, I'd have to look at
2 the e-mails to see the exact date.

3 Q. We'll get to the e-mails in a minute. But you were asked
4 to examine a specific tattoo on the body of Chad Marks,
11:16:38AM 5 correct?

6 A. Correct, sir.

7 Q. Okay. And you know that that request emanated from the
8 Assistant U.S. Attorney in this case, right?

9 A. Yes, sir.

11:16:54AM 10 Q. And it arose out of -- you were told that it arose out of
11 the fact that he saw a photograph of Chad Marks on social
12 media, correct?

13 A. I believe that's correct, sir.

14 Q. Okay. If you turn to page 35 in the same exhibit -- tell
11:17:18AM 15 me when you're there, please, Mr. Wascher.

16 A. I just passed it. Okay, sir.

17 Q. At the top there's an e-mail from Horikawa to Martinez
18 saying, "Carlos, sorry about this, but the AUSA searched
19 social media and saw what appears to be a recent photo Marks
11:17:41AM 20 posted on a social media page."

21 Did you see this message at any point, sir?

22 A. I can't recall, sir.

23 Q. Was the essence of this conveyed to you?

24 A. What was conveyed to me was they were curious about the
11:17:54AM 25 tattoo, they wanted information about the tattoo.

1 Q. A tattoo with the word Pride on it, correct?

2 A. I believe that was all that was visible on the picture.

3 Q. And that's the tattoo in question, correct?

4 A. Correct, sir.

11:18:05AM 5 Q. All right. And what specifically were you asked to
6 inquire about or look into?

7 A. Just get more information about the tattoo, what it was.

8 Q. Okay. Was the Dirty White Boy issue raised before you?

9 A. No, sir.

11:18:22AM 10 Q. Okay. Were you looking for anything in particular on the
11 tattoo?

12 A. No, sir.

13 Q. Okay. Were you looking for any evidence that it was a
14 tattoo affiliated -- evidence of affiliation with the Dirty

11:18:34AM 15 White Boys?

16 A. No, sir, I wasn't looking for anything. I was just trying
17 to get a clear picture of the tattoo for them.

18 Q. Okay. And the inquiry you were asked to conduct was
19 specific to that tattoo, correct?

11:18:47AM 20 A. That's correct.

21 Q. And that's the reason you had Chad Marks brought to your
22 office on August 17th, correct?

23 A. To get a picture of the tattoo, yes, sir.

24 Q. Just for the Court's edification, let me invite your
11:19:17AM 25 attention to page 37 of Defense Exhibit B. Had you seen that

1 photo before August 17th?

2 A. Not to my knowledge, sir.

3 Q. Okay. Is that the photo that gave rise, as far as you
4 know, gave rise to your meeting on August 17th with Chad
11:19:43AM 5 Marks?

6 A. To the best of my knowledge, sir.

7 Q. Okay. And it's on his left arm -- it's hard to see from
8 this photograph, but looks like the word Pride peeking out
9 from below his left shirt sleeve, correct?

11:19:56AM 10 A. Yes, sir.

11 Q. Okay. It turns out that's right, it is Pride, right?

12 A. Yes, sir.

13 Q. You saw it close up, right?

14 A. Yes, sir.

11:20:03AM 15 Q. And so you brought him to your office, correct?

16 A. That's incorrect.

17 Q. Someone else brought him?

18 A. I don't recall who brought him over, if he came over by
19 his self. He came to the lieutenant's office, though, sir.

11:20:17AM 20 Q. I got it. And you had him strip down?

21 A. I believe I had him just go down to his shorts.

22 Q. Yeah. Did you need to do that to examine this tattoo?

23 A. That's our standard practice for doing a photo shoot of an
24 inmate, sir.

11:20:33AM 25 Q. You didn't need to do that to examine the tattoo, correct?

1 A. I conducted the standard practice for doing a photo shoot,
2 sir.

3 Q. Did you need to have him strip to his shorts?

4 **MR. RODRIGUEZ:** Objection, asked and answered.

11:20:45AM 5 **THE WITNESS:** Sir, I followed our standard practice
6 for conducting a photo shoot.

7 **BY MR. GLEESON:**

8 Q. Were you asked to conduct a photo shoot?

9 A. I provided a photo shoot.

11:20:56AM 10 Q. I know that. Were you asked to examine a tattoo on the
11 one hand or asked to conduct a photo shoot on the other?

12 A. I don't recall what the exact instructions were. They
13 just wanted information regarding that tattoo.

14 Q. Did you think you might help out AUSA Rodriguez by going
11:21:12AM 15 beyond the mission you were given?

16 A. Quite the opposite. I was a little busy. That was a step
17 out of my lane right now because I was extremely busy with
18 other stuff.

19 Q. Did you find the tattoo that you were asked to examine
11:21:28AM 20 suspicious?

21 A. No.

22 Q. Okay. What's the rest of it consist of?

23 A. Of the tattoo, sir?

24 Q. Yes.

11:21:36AM 25 A. I believe it was Irish Pride, and don't even ask me to

1 describe what the character is. I don't know if it's a
2 leprechaun or a guy dancing. I'm not sure.

3 Q. Isn't it a fact it's Irish Pride and a leprechaun?

4 A. Again, sir, I said I don't know. I couldn't tell you if
11:21:54AM 5 it's a fact. I don't know what that figure was. I know it
6 says Irish Pride.

7 Q. And do you -- in your mind, is that indicative of any gang
8 membership?

9 A. No, sir.

11:22:06AM 10 Q. Okay. Did you write back to -- by the way, there are other
11 Irish related tattoos on Mr. Marks, correct?

12 A. I don't recall, sir.

13 Q. Do you recall Erin go Braugh?

14 A. No, sir.

11:22:19AM 15 Q. You don't recall that tattoo?

16 A. I don't recall what other tattoos were on him, sir. I
17 wasn't focused -- I was just taking the pictures.

18 Q. You wrote back to Ms. Horikawa that day, correct?

19 A. I can't recall, sir. If the e-mails say that.

11:22:37AM 20 Q. Okay. Well, let me invite your attention to page 53.

21 A. 53, sir?

22 Q. Yes. Of that set of e-mails that's marked as Defense
23 Exhibit B.

24 A. Yes, sir.

11:23:06AM 25 Q. And you wrote to her, and this is in the middle of page

1 53, "I pulled the inmate in and took photographs of the
2 inmate. Attached you will find a photo of the tattoo in
3 question. It says Irish Pride on it."

4 And then you go on and say "the inmate admitted he
11:23:30AM 5 had previously been part of the Dirty White Boys. However, I
6 do not know if this tattoo is affiliated with that group. If
7 you have any questions or require any further information,
8 don't hesitate to contact us."

9 Prior to your conversation with Chad Marks, had you
11:23:57AM 10 heard of the Dirty White Boys?

11 A. Yes, sir.

12 Q. Is that a prominent gang within the Bureau of Prisons?

13 A. I wouldn't say they're prominent. They're a mid to low
14 level. They're not like the Aryan Brotherhood or the Bloods
11:24:10AM 15 or the Crips.

16 Q. And they're not a group that is a public safety factor?

17 A. We have different public safety factors. Which ones do
18 you mean, sir?

19 Q. Are they a designated -- earlier on I asked you whether or
11:24:29AM 20 not the disruptive group public safety factor included the
21 Dirty White Boys, and I think you said it does not, correct?

22 A. Disruptive group doesn't, but disruptive group is very
23 exclusive. There's STGs and there's disruptive group.

24 Q. But you knew about the Dirty White Boys?

11:24:47AM 25 A. Yes, sir.

1 Q. Do you know about the tattoos that are associated with
2 that group?

3 A. I am familiar with their main tattoos that associate them.

4 Q. Which are what?

11:24:55AM 5 A. It's typically a guard tower or prison wall, something
6 like that, representing an institution; and sometimes it will
7 have like the name of that institution somewhere on that
8 tattoo.

9 Q. And you didn't see any of that on Chad Marks?

11:25:09AM 10 A. I did not.

11 Q. You didn't see DWB, correct?

12 A. Not to my recollection, no, sir.

13 Q. You heard 707 is affiliated with the Dirty White Boys?

14 A. I'm not sure, sir.

11:25:18AM 15 Q. Okay. Did you -- when you wrote this e-mail to
16 Ms. Horikawa on August 17th, did you believe that it's
17 possible that Irish Pride and a leprechaun might be associated
18 with the Dirty White Boys?

19 A. I had no idea. It could be. I don't know. As I stated,
11:25:37AM 20 I don't know all of their tattoos or everything that goes with
21 it.

22 Q. And you knew at the time of this encounter with Mr. Marks
23 he had this motion to reduce his sentence pending, correct?

24 A. I don't believe so, sir. I was just asked about the
11:25:58AM 25 tattoo.

1 Q. Okay.

2 A. No one briefed me on everything that was going on.

3 Q. All right. And you said on your direct that you had in a
4 casual conversation with him he told you that he ran with the
11:26:12AM 5 Dirty White Boys, correct?

6 A. Correct, sir.

7 Q. When was the first time that you said to anyone that Marks
8 supposedly said to you that he ran with the Dirty White Boys?

9 A. I don't recall, sir. It was probably in my e-mail reply
11:26:30AM 10 regarding the tattoo.

11 Q. The e-mail reply on page 53?

12 A. Is that the first response I had, sir?

13 Q. Sorry?

14 A. Was that the first response back regarding the tattoo?

11:26:44AM 15 Q. I don't know.

16 A. So I can't -- I would assume it would be the first
17 response back. I'm not sure if that's the first response
18 back.

19 Q. Didn't he tell you that he quit the Dirty White Boys,
11:26:55AM 20 according to you, that he quit the Dirty White Boys when he
21 was in Coleman?

22 A. He didn't say he quit. He said he didn't -- would
23 distance himself from them because he didn't believe in what
24 they believed basically.

11:27:06AM 25 Q. Did you write in your declaration that he dropped out of

1 it while he was in FCC Coleman?

2 A. I don't believe so, sir.

3 Q. Look at paragraph 7 of your declaration.

4 A. Yes, sir.

11:27:31AM 5 Q. Right? He told you that he quit, he dropped out of the
6 Dirty White Boys according to you, correct?

7 A. Correct, sir.

8 Q. Do you know that the AUSA -- do you know that the
9 Government in its application to the Court in opposition to
11:27:46AM 10 the motion to reduce sentence stated that, according to you,
11 he told you that he joined the Dirty White Boys?

12 A. I don't know anything about that, sir.

13 Q. But he never told you that, correct? According to you?

14 A. He never told me specifically he joined the Dirty White
11:28:03AM 15 Boys, no, sir.

16 Q. And in this conversation that you had with Mr. Marks, he
17 just volunteered that he had been part of the Dirty White Boys
18 during the period of time that ended six years earlier
19 roughly, correct?

11:28:25AM 20 A. I don't believe specific timeframes were ever mentioned.
21 And, honestly, I don't recall how it even came up. We were
22 just talking casual and he was telling me about other
23 institutions and stuff like that.

24 I believe it was because of the photographs, he
11:28:38AM 25 said he understood why we were needing to take the photographs

1 or something.

2 Q. Yeah. Isn't it a fact that he told you that the only gang
3 that he was part of was the Christian gang?

4 A. No, sir.

11:28:48AM 5 Q. And you didn't see any evidence on him of this sort that
6 the Government was looking for, correct?

7 A. I had no idea what the Government was looking for, sir.

8 Q. Government was looking for evidence that his tattoos were
9 indicative of gang membership, correct?

11:29:07AM 10 A. But I wasn't looking for that, sir. That's what you asked
11 me.

12 Q. The Government was, is that your testimony?

13 A. I have no idea what they're looking for now, sir.

14 Q. We established earlier the photographs were taken and you
11:29:34AM 15 talked to Chad Marks on August 17th, correct?

16 A. I believe that's correct, sir.

17 Q. And you spoke to AUSA Rodriguez? Do you recall we
18 established earlier you spoke to him, communicated with him on
19 August 23rd?

11:29:47AM 20 A. Yes, sir.

21 Q. Okay. And did you speak to him on the phone about your
22 meeting with Marks?

23 A. At what time, sir?

24 Q. On August 23rd.

11:30:04AM 25 A. I don't recall on that date if I spoke. I have spoken to

1 him on the phone, but I don't recall if it was on that date.

2 Q. And you sent him the photos that you took of Marks,
3 correct?

4 A. I don't remember if I sent them directly to him or to
11:30:18AM 5 Ms. Horikawa who was requesting them. I can't remember who I
6 sent them to directly, sir.

7 Q. Let me -- just to be clear, let me invite your attention
8 to the Government's opposition to the motion that's pending
9 before the Court, and which is Government -- Defense

11:30:41AM 10 Exhibit A, page 2.

11 Do you have that, sir?

12 A. Yes, sir.

13 Q. And the second full paragraph, first sentence, "when he
14 was incarcerated at Coleman federal prison from September 2011
11:31:00AM 15 to January of 2013, Marks joined the Dirty White Boys."

16 Do you see that?

17 A. The second paragraph, sir?

18 Q. Second full paragraph.

19 A. Okay. Yes, sir.

11:31:14AM 20 Q. Okay. That's not what you say Marks told you, correct?

21 A. Not word-for-word, no, sir.

22 Q. Well, in fact, Marks told you the opposite, right? Didn't
23 he tell you that he quit the Dirty White Boys?

24 A. That was part of what he told me, yes, sir.

11:31:40AM 25 Q. Okay. And did you tell AUSA Rodriguez that Marks told you

1 that he quit the Dirty White Boys?

2 A. At what time?

3 Q. At any time.

4 A. Sir, yes, I did, but I don't recall if it was at this
11:31:54AM 5 time.

6 Q. Did you tell him before this was filed on August 23rd?

7 A. I don't recall, sir.

8 Q. Okay. You say that Marks told you that he participated in
9 beatings at the behest of the leaders of the Dirty White Boys;
11:32:15AM 10 is that correct?

11 A. I believe I said that Marks informed me that he was
12 instructed to beat up homosexuals and minorities at their
13 direction.

14 Q. At Coleman?

11:32:26AM 15 A. I believe it was at Coleman, yes, sir.

16 Q. You're an investigator? You consider yourself an
17 investigator?

18 A. That is what I am, yes, sir.

19 Q. Did you pull the BOP files about his tenure at the
11:32:39AM 20 penitentiary in Coleman?

21 A. Yes, sir.

22 Q. You saw in there there's not a single mention of any
23 violence on his part while he was in Coleman, correct?

24 A. That's correct.

11:32:49AM 25 Q. Okay. Not a single mention of any beatings, correct?

1 A. That's correct.

2 Q. Not a single mention anywhere of affiliation with Dirty
3 White Boys, right?

4 A. No, sir.

11:32:59AM 5 Q. That's correct, right?

6 A. Yes, that's correct.

7 Q. Is Dirty White Boys a secret organization?

8 A. No, sir.

9 Q. It doesn't hide its light under a bush in the BOP,
11:33:06AM 10 correct?

11 A. You have to clarify what you're asking.

12 Q. It beats people up, right?

13 A. Allegedly, yes, sir.

14 Q. It is, as far as Bureau of Prisons administrative staff is
11:33:23AM 15 concerned, it's a significant problem, right?

16 A. I wouldn't classify it as significant, no, sir.

17 Q. Would you classify it as a sort of problem where there
18 would be a mention in the inmate's file if the inmate was
19 thought to be affiliated with the Dirty White Boys?

11:33:37AM 20 A. There might be. There's a very thorough process we have
21 to go through to link an inmate to a disruptive or a serious
22 threat group. So it may be in there, may not. Depends how
23 much information they have to link that inmate.

24 Q. There's references that can be made in the BOP files to
11:33:56AM 25 suspect affiliation even before they're linked, correct?

1 A. Yes, sir. You can put intelligence entries or notes, yes,
2 sir.

3 Q. You can write a report as an SIS technician if you receive
4 inmate information that another inmate is in the Dirty White
11:34:11AM 5 Boys, right?

6 A. Yes, sir.

7 Q. And there's none of that in the BOP files, correct?

8 A. Not that I saw, sir.

9 Q. And you looked at the files?

11:34:19AM 10 A. Yes, sir.

11 Q. In fact, there's not a single disciplinary infraction of
12 any sort on the part of Chad Marks while he was at Coleman,
13 right?

14 A. I don't believe so, sir.

11:34:37AM 15 Q. You know that's the case, right?

16 A. I said I don't believe so, sir.

17 Q. You looked for it, correct?

18 A. I did look for it.

19 Q. And you didn't find one?

11:34:44AM 20 A. I don't believe I found any at Coleman.

21 Q. If you found one would you have brought it to the Court's
22 attention?

23 A. If asked, yes, sir.

24 Q. Yeah. And you didn't, correct?

11:34:52AM 25 A. I don't believe I found anything at Coleman, sir.

1 Q. You don't believe it or you know that you didn't?

2 A. I know that I looked. And unless I have that intelligence
3 file directly in front of you or in front of me, I can't quote
4 you exactly.

11:35:05AM 5 Q. Did you receive training, sir, on how to elicit
6 confessions from inmates?

7 A. Elicit confessions, sir?

8 Q. Yeah. Did you receive training?

9 A. What do you mean by "elicit confessions"?

11:35:20AM 10 Q. On how to get confessions from inmates.

11 A. I've received training on how to interview and obtain
12 information from inmates, yes, sir.

13 Q. Did you find it surprising that an inmate who has no
14 record of any affiliation with the Dirty White Boys after more
11:35:38AM 15 than a decade in the Bureau of Prisons would admit to you in a
16 casual conversation such an affiliation?

17 A. No.

18 Q. You didn't think that was unusual?

19 A. No, I didn't.

11:35:48AM 20 Q. Do you think it's unusual for someone who is looking to
21 reduce his sentence to offer that up?

22 A. I had no idea he's looking to reduce his sentence, sir.

23 Q. AUSA Rodriguez prepared the initial draft of your
24 declaration, correct?

11:36:02AM 25 A. I believe so.

1 Q. You gave him information and he drafted the declaration,
2 right?

3 A. Yes, sir.

4 Q. Okay. You told him that Marks may be responsible for the
11:36:14AM 5 SIM card, right?

6 A. At what time? One of the --

7 Q. When you spoke to him about -- about the information that
8 ended up in your declaration, you told him that Marks may be
9 responsible for it, right?

11:36:28AM 10 **MR. RODRIGUEZ:** Object to the form of the question.

11 **THE COURT:** Overruled.

12 **THE WITNESS:** I talked to him on numerous occasions,
13 sir. I mean, I'm sure at one point I've said that, yes.

14 **BY MR. GLEESON:**

11:36:38AM 15 Q. Didn't he send you a declaration that said Marks was
16 responsible for it and you changed it to may be?

17 A. He sent me a declaration. I don't recall the exact words.
18 I told him I would go through it and make corrections as I saw
19 fit and return it.

11:36:51AM 20 Q. Do you remember changing the language that Mr. Rodriguez
21 put into your declaration from he was supplying and
22 transporting Suboxone to attempting to supply Suboxone?

23 A. Do you have --

24 Q. I'm asking what your recollection is.

11:37:10AM 25 A. No, sir. I've told you, I don't remember the exact

1 verbiage. I remember he sent me one. I corrected it, sent it
2 back. If you're gonna ask me exact verbiage, I need a copy of
3 that to review.

4 Q. Do you remember making changes to your declaration?

11:37:24AM 5 A. Yes, sir, I've already said I did.

6 Q. Okay. Are you familiar with other -- any cases in the
7 Bureau of Prisons of inmates in the Dirty White Boys?

8 A. Familiar of cases?

9 Q. Particular individuals.

11:37:48AM 10 A. Like specific individuals?

11 Q. Yes.

12 A. No, sir.

13 Q. Okay. Ever have any at FMC Lexington?

14 A. I don't believe we have any that are actually tagged as
11:37:58AM 15 Dirty White Boys right now at FMC Lexington.

16 Q. Yeah. And does that effect designation if you're tagged
17 as a Dirty White Boy?

18 A. What designation, sir?

19 Q. Let me be more direct about it. Would it be unusual for
11:38:15AM 20 someone who was thought to be a member of the Dirty White Boys
21 to be transferred from a high security facility to a medium
22 security facility?

23 A. Depends on what -- the reason for the transfer, what they
24 needed.

11:38:28AM 25 Q. So there's no impediment to being designated to a lower

1 security facility if you're a member of the Dirty White Boys?

2 A. There's numerous factors that go into that. In our
3 institution we have everybody from minimum custody to high
4 custody. So there's a lot of factors that go into that.

11:38:48AM 5 It's usually the CMC Department that does all those
6 calculations on points, retainers, everything like that.

7 Q. Is there anything akin to like a profile of what a member
8 of a Dirty White Boys --

9 **MR. RODRIGUEZ:** Objection.

11:39:00AM 10 **BY MR. GLEESON:**

11 Q. -- is or does in the BOP?

12 **MR. RODRIGUEZ:** Objection, Judge. This goes into an
13 area of BOP intelligence gathering that I don't think is
14 relevant to this hearing, and I don't think the witness should
11:39:14AM 15 have to disclose in terms of what particular profiles there
16 are.

17 **THE COURT:** I think he can answer if there is such a
18 profile. Maybe he doesn't have to say what it is.

19 **THE WITNESS:** There are profiles for each individual
11:39:26AM 20 STG and DTG. They're profiles like the information they use,
21 symbols they use, practices they use, statements they follow
22 or policies they follow for their groups.

23 **BY MR. GLEESON:**

24 Q. Do you know what those are for the Dirty White Boys?

11:39:46AM 25 A. Specifically all of them?

1 Q. Any of them.

2 A. I know a couple of them. I don't know everything about
3 the Dirty White Boys.

4 Q. Tell us what you know, please.

11:39:55AM 5 **MR. RODRIGUEZ:** Objection.

6 **THE COURT:** Overruled.

7 **THE WITNESS:** They're a low to medium threat group.

8 They're usually whites, don't like minorities or homosexuals.

9 Again, their tattoos are commonly something to do with the
11:40:11AM 10 institution they were at, it could be a picture or a tattoo of
11 a prison or a guard tower, something like that.

12 **BY MR. GLEESON:**

13 Q. Is it -- is it common for a member of the Dirty White Boys
14 to complete thousands of hours of programming, do you know?

11:40:30AM 15 A. What do you mean by "is it common" for them?

16 Q. Would it be typical in your judgment as an SIS technician
17 and investigator, would it be common in your judgment for a
18 member of the Dirty White Boys to complete more than 1,600
19 hours of prison programming?

11:40:47AM 20 A. In my judgment at SIS, whether an inmate is in STG or DTG,
21 would have no bearing on whether he wanted to get an education
22 or complete courses.

23 Q. And would you expect if you reviewed the file of a Dirty
24 White Boy member to see favorable recommendations from BOP
11:41:05AM 25 staff? That's something you would expect as an investigator?

1 A. There's nothing common place to expect. An inmate can be
2 a member of an STG and be an extremely polite and honest
3 person inside the institution.

4 Q. And would you expect that a BOP corrections officer, a
11:41:23AM 5 lieutenant, would recommend a member of a Dirty White Boys --
6 the Dirty White Boys for employment in the workforce?

7 A. Yes, sir.

8 Q. You would expect that?

9 A. Yes.

11:41:33AM 10 Q. And you would expect that a member of the Dirty White Boys
11 would be a proficient and successful tutor for other inmates
12 to pass their GED? Is that something you would expect?

13 A. Is it specifically a Dirty White Boy or is this any person
14 in an STG?

11:41:58AM 15 Q. I'm asking you as an investigator in determining whether
16 one of the inmates is in the Dirty White Boys --

17 **THE COURT:** I think this is straying a little far
18 afield what this officer might know or what his opinion is.

19 **MR. GLEESON:** I get it, Judge. I'll move on.

11:42:14AM 20 **BY MR. GLEESON:**

21 Q. You mentioned that Mr. Marks is suspected of supplying
22 Suboxone, correct?

23 A. Yes, sir.

24 Q. Any specifics on that?

11:42:26AM 25 A. Nothing specific. It was just information.

1 Q. Are there any incidents in which -- I mean, just
2 information?

3 A. Yes, sir.

4 Q. Is the information on which -- based on which you suspect
11:42:40AM 5 Mr. Marks of supplying Suboxone, does any of that information
6 include other inmates actually being punished for the Suboxone
7 like Moore was punished for the SIM card?

8 Do you understand my question?

9 A. No, sir.

11:42:52AM 10 Q. If we went past your statement and went down to the brass
11 tacks of the information about Suboxone trafficking by Chad
12 Marks, would it include any events in which other people were
13 punished for Suboxone?

14 MR. RODRIGUEZ: Objection to "brass tacks." Object
11:43:14AM 15 to the form.

16 THE COURT: I'm sorry, Mr. Rodriguez, I didn't hear
17 you.

18 MR. RODRIGUEZ: Sorry, Judge. I object to the form
19 and particularly the phrase "brass tacks."

11:43:22AM 20 THE COURT: Well, if the witness understands what
21 that means.

22 MR. GLEESON: I'll withdraw it, Judge.

23 BY MR. GLEESON:

24 Q. When it came to the SIM card, the Court got told that Chad
11:43:33AM 25 Marks possessed a SIM card, correct?

1 A. I wasn't here. I assume that's what happened.

2 Q. I showed you the -- and the Government (sic) challenged
3 that. In response to that you provided a declaration,
4 correct?

11:43:49AM 5 A. Yes, sir.

6 Q. And --

7 **MR. RODRIGUEZ:** Objection. The Government didn't
8 challenge it. It was the defense who challenged it, Judge.

9 **MR. GLEESON:** Defense challenged it. Thank you,
11:43:57AM 10 Mr. Rodriguez.

11 **MR. RODRIGUEZ:** You're welcome.

12 **BY MR. GLEESON:**

13 Q. And after the challenge it was revealed that, in fact,
14 someone else was punished for that SIM card, correct? It was
11:44:10AM 15 Moore?

16 A. Yes, sir.

17 Q. And you looked at the incident report and there's no
18 mention of Chad Marks, correct?

19 A. No, sir.

11:44:18AM 20 Q. Right? That's correct, right?

21 A. That is correct.

22 Q. Now, this Suboxone, we have no details, correct?

23 A. Correct.

24 Q. And my question for you is if we got them, would they
11:44:31AM 25 include another incident report where someone else was

1 punished for Suboxone?

2 A. Are you asking me to specifically identify inmates that
3 provide information to the SIS Department?

4 Q. No. I'm asking you whether there are inmates' incident
11:44:45AM 5 reports for Suboxone trafficking that you attribute to Chad
6 Marks where someone else was charged with it.

7 Do you understand the question?

8 A. Are you specifically asking me if there's another incident
9 report somewhere that lists Chad Marks?

11:45:00AM 10 Q. I'm asking you whether if we pursued beyond your blanket
11 statement that you suspect him of Suboxone and we got the
12 details, whether the details would include an incident report
13 like the one we have against Thomas Moore?

14 **MR. RODRIGUEZ:** Object to the form.

11:45:25AM 15 **THE COURT:** Overruled.

16 **THE WITNESS:** I'm still not sure what you're asking
17 me because if you're asking if there's an incident report that
18 reflects Chad Marks, I'm not sure. I don't write all the
19 incident reports in the Bureau.

11:45:39AM 20 If you're asking me if a specific inmate provided
21 information, you're asking me to provide identification of an
22 inmate that provides information to SIS in front of another
23 inmate.

24 **BY MR. GLEESON:**

11:45:49AM 25 Q. Has there ever been any disciplinary action against Chad

1 Marks based on Suboxone?

2 A. Not to my knowledge.

3 Q. And you would know, right?

4 A. At FMC Lexington?

11:46:00AM 5 Q. Yes. You would know?

6 A. At FMC Lexington?

7 Q. Correct.

8 A. Not at FMC Lexington.

9 Q. Did you check to see whether he was subjected to other
11:46:09AM 10 discipline in other facilities?

11 A. Yes, sir.

12 Q. Was he for Suboxone?

13 A. He was part of an investigation in another institution. I
14 can't recall --

11:46:15AM 15 Q. My question was whether he was --

16 **MR. RODRIGUEZ:** Judge, I object. The witness should
17 be allowed to answer the question without being interrupted.
18 He had not finished the answer.

19 **THE COURT:** All right. Had you finished your answer?

11:46:28AM 20 **THE WITNESS:** Almost, sir.

21 **THE COURT:** Go right ahead.

22 **THE WITNESS:** When I reviewed his files, yes, he had
23 been under investigation for Suboxone. I don't recall if he
24 had been charged with it or disciplined for it. I know
11:46:40AM 25 there's an investigative file regarding him and Suboxone.

1 BY MR. GLEESON:

2 Q. If you had -- if you had learned that he was disciplined
3 for distributing Suboxone, would you recall that?

4 A. Possibly.

11:46:53AM 5 Q. The testimony you gave with regard to Chad Marks and
6 receiving money for providing legal services, do you recall
7 that testimony?

8 A. Yes, sir.

9 Q. Did you ever speak to Lieutenant Fowler about Marks
11:47:15AM 10 providing legal assistance to other inmates?

11 A. I can't remember specifically, but probably.

12 Q. Isn't it a fact that Marks told Fowler he was doing that?

13 A. I have no idea, sir.

14 Q. Isn't it a fact he told Fowler that he was providing legal
11:47:29AM 15 assistance and on some occasions he received money for it?

16 A. I just stated, sir, I have no idea.

17 Q. Now, did you ask Mr. Fowler that?

18 A. I don't recall that.

19 Q. Did you ask other SIS people that?

11:47:41AM 20 A. Did I ask them what, sir?

21 Q. Whether or not Marks told them that he was providing legal
22 assistance to other inmates and receiving money for it?

23 A. No, I've never asked him that.

24 Q. Okay. Did you ask the other people what information was
11:47:55AM 25 provided in early August?

1 A. Originally.

2 Q. About Mr. Marks?

3 A. I've already told you I had no idea what was asked. So of
4 course I didn't.

11:48:05AM 5 Q. I'm almost finished, Judge, you'll be happy to hear.

6 Did you -- have you interviewed Marks at all about
7 this allegation of conducting a business?

8 A. I don't believe I have.

9 Q. Have you ever written him up for it?

11:48:35AM 10 A. No.

11 Q. Haven't filed an incident report?

12 A. No.

13 Q. Okay. Did you look at Chad Marks' PSR? Did you read his
14 presentence report?

11:49:02AM 15 A. Is it the same thing we call a PSI?

16 Q. Yes, presentence investigative report.

17 A. I don't believe I ever pulled his PSI.

18 Q. Okay. And the information that is provided to SIS
19 officers -- I'll withdraw that.

11:49:23AM 20 One thing I want to be clear before I finish, sir,
21 the testimony you provided here and the declaration you
22 provided here is that Chad Marks said to you he was once a
23 member of the Dirty White Boys, correct?

24 A. Correct.

11:49:43AM 25 Q. And the testimony you provided here is that Chad Marks is

1 suspected of having tried to possess a SIM card, correct?

2 A. Correct.

3 Q. If one were to -- so if one were to look in the Bureau of
4 Prisons files, would you find any reference to either of those
11:50:09AM 5 assertions on your part?

6 A. From myself?

7 Q. From anyone.

8 A. If you go through the entire Bureau of Prisons files, I
9 don't know, sir. If you go through my files you won't find
11:50:20AM 10 anything.

11 Q. You wouldn't find anything about the SIM card and Chad
12 Marks, correct?

13 A. No, sir.

14 Q. And you wouldn't find anything about Dirty White Boys and
11:50:29AM 15 Chad Marks, correct?

16 A. Other than the statements that have been provided to the
17 Court, no, sir.

18 Q. Yeah. And you regard being affiliated with the Dirty
19 White Boys as a security concern within the Bureau of Prisons?

11:50:43AM 20 A. They would fall under the STGs, sir, not the DTGs as I
21 stated.

22 Q. Is that different for people who are presently members
23 as --

24 **THE COURT:** I didn't hear the answer.

11:50:55AM 25 **THE WITNESS:** They would fall under the STGs, Your

1 Honor. There's serious threat groups and then there's
2 disruptive groups. He keeps saying disruptive groups, which
3 are extremely violent groups of inmates.

4 **THE COURT:** Dirty White Boys is something less than
11:51:06AM 5 that?

6 **THE WITNESS:** They would fall under STGs, Your
7 Honor, a lower category, yes, sir.

8 **THE COURT:** S-D?

9 **THE WITNESS:** STG, serious threat group. Okay.

11:51:18AM 10 **BY MR. GLEESON:**

11 Q. And is someone considered to be part of the serious threat
12 group if they're a former member of one of those groups?

13 A. If they are a current member, former member, associate,
14 affiliate, yes, sir.

11:51:31AM 15 Q. Did you do anything within the Bureau of Prisons -- not in
16 this court, not in your declaration -- did you do anything
17 within the Bureau of Prisons to document Chad Marks'
18 membership in a serious threat group?

19 A. "Document" his membership? What do you mean, sir?

11:51:47AM 20 Q. Did you do anything within the Bureau of Prisons -- fill
21 out any forms, take any action -- based on your assertion that
22 Chad Marks is a former member of a serious threat group?

23 A. The only thing I did was respond to the Court, provide the
24 information that was given.

11:52:02AM 25 Q. You filled out no paperwork within the institution,

1 correct?

2 A. No, sir.

3 **MR. GLEESON:** Thank you. I have nothing further.

4 **THE COURT:** Keep in mind repetitive examination is

11:52:22AM 5 not appreciated. We covered a lot of the waterfront here and

6 I think I get it. So, please, something that needs to be

7 done, not...

8 **REDIRECT EXAMINATION**

9 **BY MR. RODRIGUEZ:**

11:52:40AM 10 Q. I want to go back to your declaration that you signed,

11 Mr. Wascher.

12 A. Yes, sir.

13 Q. Mr. Gleeson pointed out that I sent you a draft; is that

14 correct?

11:52:52AM 15 A. Yes, sir.

16 Q. And that you made corrections -- and that you made

17 corrections to it and let me know, and then I sent you a

18 revised version; is that correct?

19 A. That is correct, sir.

11:53:07AM 20 Q. Is the version that you signed -- is the version -- is the

21 version of the declaration that you signed accurate in terms

22 of what you believe to be true?

23 A. That is correct, sir.

24 Q. It was the version that you ultimately approved, including

11:53:25AM 25 your changes, correct?

1 A. That is correct, sir.

2 Q. Have I ever shown you a copy of my legal memoranda to the
3 Court in this case?

4 A. No, sir.

11:53:33AM 5 Q. You indicated earlier, I think when Mr. Gleeson was asking
6 you questions, that the Dirty White Boys is a group that
7 targets gay people and minorities?

8 A. Typically they're pro white. So they target homosexuals,
9 minorities, anyone that's not white.

11:53:58AM 10 Q. Okay. And would you say that somebody who has referred to
11 "niggers" and "Spics" in correspondence with others might very
12 well share those values as being pro white and anti-minority?

13 A. I would say they could share some of the values, yes, sir.

14 Q. Mr. Gleeson asked you several times whether there's any
11:54:29AM 15 indication in Mr. Marks' disciplinary file that he beat people
16 either for the White Boys or for anybody else while he was at
17 Coleman.

18 Do you remember those questions?

19 A. Yes, sir.

11:54:40AM 20 Q. Let me ask you this: Is every time an inmate beats another
21 inmate, is that somehow reported or reflected in the
22 assaulting inmates's record?

23 A. Definitely not.

24 Q. Why not?

11:54:54AM 25 A. It's different inside a prison than it is outside a

1 prison. Inside a prison inmates don't want us involved in
2 their business. Probably nine out of ten fights or assaults
3 happen in prison we have no idea they happen. The inmates
4 don't want to report it for fear of retaliation or they don't
11:55:11AM 5 want us getting involved in their business.

6 Q. Prior to your meeting with Chad Marks to take the photo of
7 the tattoo, had anybody talked to you about asking him about
8 the Dirty White Boys?

9 A. No, sir.

11:55:38AM 10 Q. Did you have in mind that when he came in to meet with you
11 to take photographs that you would ask him about the Dirty
12 White Boys?

13 A. No, sir.

14 Q. Who initiated the entire subject of the Dirty White Boys?

11:55:52AM 15 A. Chad Marks.

16 Q. I think you indicated in connection with -- in response to
17 Mr. Gleeson's last few questions that FMC Lexington is not the
18 only facility where information about Chad Marks distributing
19 Suboxone exists; is that correct?

11:56:27AM 20 A. That's correct, sir.

21 Q. And where did the information about the leaders of the
22 Dirty White Boys gang directing Marks to beat up people, beat
23 up minorities and gay people come from? From whom?

24 A. From Chad Marks, sir.

11:57:27AM 25 Q. And last question, Judge, I think Mr. Gleeson asked you

1 whether you would expect a member of a gang to take -- I think
2 he said 1,600 hours of classes. Does the fact that an inmate
3 takes 1,600 or more hours of classes have anything to do with
4 whether he's violent or whether he's a member of a gang?

11:58:19AM 5 A. No, sir.

6 Q. Does it have anything to do with whether he will be
7 dangerous if he is released?

8 A. No, sir.

9 MR. RODRIGUEZ: Thank you, Judge. Thank you,
11:58:30AM 10 Mr. Wascher. Appreciate it.

11 THE COURT: Anything else of Mr. Wascher?

12 MR. GLEESON: Not from us. Thank you, Judge.

13 THE COURT: All right, thank you, sir.

14 THE WITNESS: Thank you, Your Honor.

11:58:41AM 15 THE COURT: You are excused, you may step down.

16 (WHEREUPON, the witness was excused).

17 THE COURT: That conclude the Government's proof on
18 the matters?

19 MR. RODRIGUEZ: Yes, Judge.

11:59:08AM 20 THE COURT: I'm sorry?

21 MR. RODRIGUEZ: I'm sorry, Judge. Yes, it does with
22 respect to the issues in this.

23 THE COURT: Okay. Mr. Gleeson, you have a witness?

24 MR. GLEESON: Judge, can we have a moment to discuss
11:59:20AM 25 it? Can we take a break?

1 **THE COURT:** Yeah.

2 **MR. GLEESON:** Give us a few minutes to discuss
3 whether or not --

4 **THE COURT:** Certainly can do that. We can also
11:59:29AM 5 break for lunch. I just envision the questioning might be --
6 I can never guess from attorneys how long the questioning will
7 be, but --

8 **MR. GLEESON:** Your call, Judge. We could use the
9 lunch hour to make a decision as to what the contours of the
11:59:47AM 10 case will be, if any.

11 **THE COURT:** All right. Well, I've got a full
12 afternoon, but I think this will take precedence. We can move
13 some other things, I think, or do them in night court here.
14 Would, like, 45 minutes be enough time to get sustenance?

12:00:04PM 15 **MR. GLEESON:** Plenty. Thank you.

16 **THE COURT:** All right, why don't we come back about
17 quarter to 2? Quarter to 1. All right, 12:45. All right,
18 thank you.

19 **MR. GLEESON:** Judge, can I ask a question --

12:00:23PM 20 **THE COURT:** You can ask.

21 **MR. GLEESON:** -- about procedure? You may recall
22 from the last time we were here we asked for an opportunity to
23 speak to the Court briefly at the conclusion of the
24 evidentiary presentation.

12:00:38PM 25 This is a motion to reduce sentence. I'm going to

1 ask the Court to consider at that time hearing separate and
2 apart from any testimony that may or may not be given, hearing
3 an allocation from Mr. Marks. Just I wanted to throw that out
4 there so the Court can mull it over, not to surprise you.

12:00:59PM

5 **THE COURT:** Well, I guess it's a little unusual
6 request, but the motion for relief is unusual, so I think it
7 could be part of his testimony, I guess, ask him questions
8 and --

12:01:23PM

9 **MR. RODRIGUEZ:** That was going to be my request,
10 Judge. If he's going to say something, it should be subject
11 to cross-examination and not simply some closing statement
12 that his lawyer should be making.

12:01:44PM

13 **MR. GLEESON:** The reason I make the request is this
14 is unusual, this is a motion under 3582(c)(1), but if it's
15 akin to anything that you do normally, it's akin to a
16 sentencing.

17 And even assuming Mr. Marks testifies, I would like
18 him to be able to address the Court in the way that a
19 defendant seeking leniency addresses the Court.

12:02:03PM

20 **THE COURT:** Yeah, a true sentencing statement of
21 course is made and the Government doesn't cross-examine,
22 although the Government questions about it, but --

23 **MR. GLEESON:** Right.

12:02:14PM

24 **THE COURT:** Mr. Marks can, as you say, allocute or
25 make a statement if he wants, and I guess if Mr. Rodriguez

1 thinks he wants to cross-examine about that, I guess I'll take
2 it question-by-question. I mean, you can make your oral
3 arguments as to why the relief should be granted.

4 **MR. RODRIGUEZ:** I understand that, Judge. I'm not
12:02:32PM 5 clear where we're going. Is the request to allow this
6 allocution in substitution of under oath testimony subject to
7 cross-examination?

8 **THE COURT:** No, I think there will be both.

9 **MR. GLEESON:** It's not that complicated.

10 **MR. RODRIGUEZ:** I do think it's complicated because
11 if he's gonna get up and say things -- first of all, this
12 isn't a sentencing, Judge. It's not. It's a motion for
13 relief that Your Honor hasn't yet --

14 **THE COURT:** I understand that.

15 **MR. RODRIGUEZ:** -- granted.

16 **THE COURT:** My expectation that Mr. Marks may
17 address some of the issues that the Government has seen fit to
18 raise here, he'll be subject to cross-examination about that.

19 When we're through, I guess I don't see any harm in
12:03:15PM 20 him making a pitch for an allocution as to why I should grant
21 the relief.

22 **MR. GLEESON:** See you at 12:45. Thank you, Judge.

23 **THE COURT:** Thank you both.

24 (**WHEREUPON**, there was a pause in the proceeding.).

12:53:48PM 25 (**WHEREUPON**, the defendant is present).

1 **THE COURT:** All right, let me just -- all right,
2 Mr. Gleeson?

3 **MR. GLEESON:** Judge, the defendant rests and I'd
4 like to use a little bit of the time I just gave back to the
12:55:14PM 5 Court to be heard in support of our motion, and the remarks I
6 make will address the Government's allegations of more recent
7 wrongful activity.

8 **THE COURT:** All right, so there will be no proof
9 from the defense ?

12:55:29PM 10 I guess both sides wish to argue today in lieu of
11 filing any briefs, although I have several very thorough
12 briefs, so I think we sort of agreed -- or both sides
13 requested leave to argue today, and that's fine.

14 **MR. RODRIGUEZ:** Whatever you like. I'm happy to
12:55:52PM 15 argue today, I'm happy to submit post-hearing briefs.
16 Whatever you prefer.

17 **THE COURT:** All right. Well, we can argue today.
18 I guess, Mr. Gleeson, you want to recite first?

19 **MR. GLEESON:** Thank you, Judge.

12:56:04PM 20 **THE COURT:** Is it still your request that
21 Mr. Marks -- that you, I guess, give some of your time to
22 Mr. Marks to allocute, or not?

23 **MR. GLEESON:** Yeah, it is. And I should have made
24 clear before the lunch break that I don't want to allocute
12:56:22PM 25 with regard to the disputed facts, about SIM cards and Dirty

1 White Boys. I wanted him to speak to the Court about his
2 rehabilitation, about what the Court has written in the past,
3 on more than one occasion, about how extraordinary it is.

4 He's here. I wanted you to hear from him. I'm
12:56:41PM 5 going to leave that up to the Court. But by no means did I
6 intend to suggest I was going to offer what is quasi-testimony
7 about events that I'll suggest have not been proven.

8 **THE COURT:** All right. Well, as I say, this is a
9 motion to reduce, but there are legal issues that the Court
12:57:05PM 10 has to decide, which I don't think Mr. Marks has any
11 particular expertise relative to.

12 **MR. GLEESON:** Correct.

13 **THE COURT:** I will let you get back -- that's not
14 quite the term -- some of your time. And rather than have you
12:57:22PM 15 talk about his rehabilitation, I would let him do that.

16 Mr. Gleeson, you may go first, then Mr. Rodriguez can.

17 **MR. GLEESON:** Judge, I'm sorry. I interrupted the
18 Court.

19 **THE COURT:** It happens all the time, both here and
12:57:38PM 20 at home.

21 **MR. GLEESON:** Judge, this is a motion to reduce the
22 sentence obviously under 3582(c)(1), and I'd like to take a
23 moment to level set a bit.

24 The question before the Court -- and I'm not going
12:57:58PM 25 to repeat my arguments with regard to your authority. To the

1 extent the Court has questions on that, I'll address them. We
2 covered that. Happy to address any questions, happy to brief
3 it again if you wish.

4 I really want to summarize for the Court, not
12:58:13PM 5 repeat, but summarize the extraordinary and compelling reasons
6 we respectfully suggest you should find there should be a
7 sentence reduction.

8 One is the simple length of the sentence, 40 years,
9 and as I pointed out to the Court the last time I was at this
12:58:32PM 10 podium, among the factors specifically in mind when Congress
11 enacted the -- what is now known as the Compassionate Release
12 Statute -- was sentences of extraordinary length.

13 The second of the -- of the reasons we suggest this
14 case holistically fits the description of one in which there
12:58:57PM 15 are extraordinary and compelling reasons to reduce the
16 sentence is the reason for the extraordinary length, which
17 despite all the hyperbole in the Government's opposing brief,
18 really had everything to do with -- well, 20 years of it had
19 to do with the exercise of the right to jury trial.

12:59:19PM 20 As this Court knows, most of the conduct on which
21 the Government relied and is arguing that Mr. Marks is a
22 danger is conduct of which the Government was aware when it
23 offered him a 20 year plea bargain, which if accepted by
24 Mr. Marks would have had him out in 2020.

12:59:40PM 25 It was the superseding to add the 924(c) counts was

1 done only after he decided not to plead guilty. So that --
2 and I'm not gonna burden the Court with the contemporary
3 discussion about the trial penalty and the way there's a
4 diminution in the percentage of trials, but long and short of
01:00:00PM 5 it is the extraordinary length of this sentence is due in
6 substantial part to the imposition of a trial penalty.

7 The third of the circumstances that contribute to
8 this case presenting extraordinary and compelling reasons is
9 the rehabilitation, and I recognize there's kind of a sliding
01:00:25PM 10 scale here.

11 And to the extent I'm going -- you're going to
12 permit my client to address that, I will truncate my remarks
13 about it, except to reiterate that as this Court has already
14 expressed, this is the sort of programming and contribution to
01:00:45PM 15 prison life and to others in prison life that you can go a
16 long time in your position and in our position and never see,
17 but I'll let Mr. Marks address that.

18 **THE COURT:** The statute suggests that rehabilitation
19 alone -- I underscore alone -- is not sufficient to warrant
01:01:08PM 20 relief. I guess on a sliding scale, does the Court consider,
21 you know, 50%? 80%? Or it's not able to be quantified?

22 **MR. GLEESON:** I don't -- I would imagine that in
23 different cases it would -- it would have different weight in
24 the calculus. We acknowledge the fact -- we can afford to
01:01:35PM 25 acknowledge the fact that rehabilitation alone cannot sustain,

1 cannot support a reduction in the sentence.

2 But it seems to me, Judge, in light of the
3 extraordinary length and the reason for the length, that you
4 can certainly -- as the *Urkevich* court did, you can certainly
01:02:01PM 5 consider that. And I don't see there's any artificial or --
6 in terms of the exercise of your discretion, any particular
7 constraint you should impose and the degree to which it should
8 influence your decision.

9 It can't support your decision alone. We get that.
01:02:18PM 10 But it is kind of out of the ballpark type rehabilitation in
11 this case.

12 I want to address now in this context the
13 Government allegations. And there's a pattern here, you know,
14 the pattern is a -- kind of a relentless search for
01:02:41PM 15 additional, obviously a very deep-seated animosity towards the
16 defendant by the Government. It's not often you can hear an
17 AUSA say in a courtroom, well, I don't think he's Satan, but I
18 think he's evil. That's, you know, I don't think the
19 Government has covered itself with professional glory here.

01:03:04PM 20 And I want to address specifically these
21 allegations that have been made -- that were made after we
22 filed on July 26th our motion.

23 The first thing I want to point out for the Court,
24 you may not have noticed this in the examination, but a week
01:03:24PM 25 after the motion was filed the Government reached out for SIS

1 at FMC Lexington and asked for information about Chad Marks.
2 That happened on August 2nd.

3 And Richard Stump, one of the -- one of the SIS
4 technicians -- who was then one of the witness' colleagues,
01:03:51PM 5 responded to that on August 5th, provided the information.
6 You heard nothing about that on direct.

7 And we've tried to get the substance of that
8 communication. We were told we would get the communications
9 from Mr. Wascher, but not from the folks and the lawyers that
01:04:11PM 10 are in Regional. That's where Ms. Horikawa is.

11 I'm going to suggest to the Court that the only
12 inference you can draw from that is the first effort to obtain
13 some useful information against Chad Marks fell flat.

14 You should also infer from this evidence that the
01:04:30PM 15 Assistant U.S. Attorney didn't want to take no for an answer.
16 The evidence shows you a foraging around on social media and
17 the discovery of that photograph you saw in the
18 cross-examination of Mr. Wascher, a photograph of Chad Marks
19 in a T-shirt that had looked like at the bottom of it a tattoo
01:04:56PM 20 that was otherwise obscured by the T-shirt the word Pride on
21 it.

22 And that occasioned by the AUSA of another mission
23 to FMC Lexington take a look at that tattoo, see what that
24 tattoo is about. And that in turn produced the February 21 --
01:05:22PM 25 excuse me, the August 21st interaction between Wascher and the

1 defendant.

2 Before -- I'm going to come back to that in minute,
3 but I really want the Court in its determination as to whether
4 the Government, separate and apart from the significance of
01:05:39PM 5 these allegations, if proved, and I stood before you the last
6 time I was here and said if you find they're proved, I'm going
7 to argue to you that they're not relevant to your
8 determination about a reduction in sentence.

9 But I'm going to ask the Court to consider very
01:05:57PM 10 carefully in determining, and I know you will, whether or not
11 the Government has proved this allegation of more recent
12 criminal activity on the evidence before you with regard to
13 the SIM cards.

14 The other pattern that develops as we get a shot
01:06:18PM 15 across the bow of adverse information about Chad Marks and
16 then upon further scrutiny, it just isn't there. I remember
17 so vividly when I was an AUSA standing in Leo Glasser's
18 courtroom, him telling me and other AUSAs, you know, the
19 Government -- I never quite fully understood this -- the
01:06:36PM 20 Government has to be as pure as Caesar's wife, probably an
21 expression that wouldn't properly be used now.

22 I got it then. I knew what it meant. The
23 Government has to turn square corners. It's got a burden of
24 proof. It has to turn square corners.

01:06:52PM 25 You got told in the Government's opposition

1 brief -- you got told that because there was suspicion that
2 Chad Marks was trying to obtain a SIM card, that there was a
3 search conducted of his cell and a SIM card was -- a container
4 was retrieved from Chad Marks' Bible. And both of those were
01:07:19PM 5 dead wrong.

6 I respectfully urge this Court to find based on the
7 testimony here today and based on this incident report that is
8 Government Exhibit 1, it just says flat out that Wascher was
9 conducting random cell searches in the Bluegrass Unit.

01:07:40PM 10 And, Judge, if you read further in this description
11 of the search and of the interview of Moore, and of course
12 read the fact that this is a write up of Moore, you will find,
13 I respectfully suggest, that that search had literally nothing
14 to do with any allegation against Chad Marks. There's no
01:08:04PM 15 reason that wouldn't have been in here.

16 And, of course, the search did not retrieve a Bible
17 of Chad Marks. And you were not told -- I'll suggest the
18 Court ought to ask itself, you know, why wasn't I told someone
19 else was written up for this ? Why wasn't I told the search,
01:08:23PM 20 according to BOP paperwork, was conducted for a different
21 reason and not for the reason advanced by the Government? Why
22 wasn't I told that the very same person who was brought in
23 here as a witness became -- authored the report based on which
24 Thomas Moore was sent to the SHU?

01:08:43PM 25 That's information that the Court should have been

1 apprised of and you were not apprised of it. Only when we
2 went beyond -- of course, we asked AUSA Rodriguez for the
3 paperwork. He said no. Only when we got it and went beyond
4 it was there some more light shed on this SIM card incident.

01:09:09PM 5 There is nothing anywhere. We know that the SIS
6 keeps files. It keeps files of what it considers to be
7 significant inmate information about contraband and other
8 criminal activity.

9 The only place anybody could ever find a Government
01:09:27PM 10 writing about Chad Marks allegedly attempting to possess a SIM
11 card is in this court. It's nowhere in the BOP files.

12 The -- turning to the Dirty White Boy allegation,
13 again, this -- the -- this all arises out of a tattoo
14 inspection requested by AUSA Rodriguez at the time -- he
01:10:01PM 15 testified otherwise, but at the time, and you can see this
16 from page 35 of our Defense Exhibit B, I believe you can see
17 that, of course, Wascher was aware of the fact that Chad Marks
18 was seeking a sentence reduction. He knew what his mission
19 was.

01:10:22PM 20 His mission was to find dirt for the Government to
21 use. And he looks at the tattoo in question, which is an
22 Irish Pride tattoo. The other photos in here reveals an
23 Erin go Braugh is a pattern that develops. He's an Irish guy.
24 He's an Irish guy with Irish tattoos.

01:10:42PM 25 And this witness is so bent on helping the

1 Government that he can't even bring himself to say that he's
2 not sure whether the Irish Pride tattoo doesn't reflect an
3 affiliation with the Dirty White Boys.

4 Also, Judge, I'm going to suggest to you little
01:11:02PM 5 details matter. He was given a specific mission. He was told
6 to look at the tattoo in question. Tattoo in question was on
7 his left -- is on my client's left arm. You don't need to
8 strip search someone to look at the tattoo in question.

9 This Wascher -- the previous inquiry to the SIS
01:11:24PM 10 folks at FMC Lexington produced a dry well for AUSA Rodriguez,
11 but when the person performing the mission was this Wascher,
12 Wascher was a gold mine. All of a sudden a SIM card violation
13 that was -- someone else was punished for and written up for
14 became our client's. All of a sudden the specific tattoo
01:11:50PM 15 inspection that was directed becomes a strip search.

16 All of that proves negative. He doesn't find a
17 tattoo of an FCI up there like the Dirty White Boys. He
18 doesn't find anything.

19 But lo' and behold, lo' and behold, in casual
01:12:07PM 20 conversation he says my client just offers up that he
21 committed assaults many years earlier between September of
22 2011 and January of 2013 in Coleman at the behest of the --
23 the bosses of the Dirty White Boys, and he quit the Dirty
24 White Boys that year.

01:12:31PM 25 In re: You should expect more of the Government.

1 Let me suggest to you that one of the questions you should be
2 asking is why when Wascher allegedly hears my client say that
3 he quit the Dirty White Boys between 2011 and 2013, why you
4 get told in the Government reply, Government opposition to our
01:12:52PM 5 motion that's when he joined it?

6 These are the sorts of things of which -- that
7 reflect conduct that you should expect of the Government that
8 you did not get in this case.

9 And so here we have an SIS investigator, a
01:13:08PM 10 technician at FMC Lexington who claims that my client
11 volunteers that he was affiliated with this dangerous group.

12 He says himself that the fact that you were
13 formerly affiliated with a dangerous group doesn't alter the
14 obligation within the facility to take action about that.

01:13:31PM 15 But he does nothing. There's nothing in August in
16 terms of BOP paperwork, there's nothing in terms of separation
17 orders, there's nothing, there's no write up. There's
18 nothing.

19 It's only in this courtroom that one person in the
01:13:48PM 20 Bureau of Prisons makes the suggestion that Chad Marks used to
21 be affiliated with the Dirty White Boys. It's an utterly
22 implausible confession. If it were made, it would have
23 produced and should have produced -- this witness' own
24 testimony tells you it should have produced action within the
01:14:08PM 25 Bureau of Prisons, but it didn't.

1 And we get as of a week ago, we get a message from
2 AUSA Martinez (sic) there's no -- there's nothing in the
3 Bureau of Prisons that suggests any affiliation in the Bureau
4 of Prisons paperwork by -- on Chad Marks' part with the Dirty
01:14:27PM 5 White Boys.

6 So the notion that he was is unsupported by any
7 documentation that this Court has a reason to expect would
8 exist.

9 And then lastly, and I told you this last time I
01:14:45PM 10 was here and I meant it when I said it, I suggest this Court
11 should not have an evidentiary hearing on this because if you
12 did, you would conclude that the Government can't prove this
13 by any standard, even by a preponderance standard.

14 But I would also argue to you that the -- if it
01:15:05PM 15 proved it, now we know the Government's allegation is not that
16 he joined it, now the allegation is that he quit it -- that
17 it's not a public safety factor. It's kind of a lower level
18 affiliation.

19 It's not even one of significant magnitude that
01:15:21PM 20 there's any record of it in the Bureau of Prisons. And it's
21 long in the past, and in between is a period of extraordinary
22 rehabilitation.

23 And I suggested to this Court that should you find
24 any concern, should you even find these facts have been
01:15:37PM 25 proved, the proper approach to that is an association

1 restriction imposed upon my client when he is serving his
2 eight years of supervised release.

3 One other thing, Judge, and, you know, again as I
4 say, the pattern is outrageous. Really hyperbolic
01:16:01PM 5 allegations. I urge you, once again, to read that missive of
6 the Government's on August 23rd. When I read it I thought
7 holy cow, this is pretty wild, this is pretty bad stuff.

8 And then you look at it and you scrutinize it and
9 you get the incident report and you get the testimony and you
01:16:19PM 10 see, well, he was actually told something different and there
11 are plenty of facts that undermine the credibility of it.

12 So once you get past that superficial allegation,
13 it doesn't -- it doesn't hang together. The whole SIM card
14 thing does not hang together. The admission about the Dirty
01:16:37PM 15 White Boys doesn't hang together.

16 And then, you know, you also got some over the top
17 language about rapist and torturer and murderer. You know, we
18 got over the transom last night some -- a whole pile of stuff
19 about the defendant's conduct in Batavia before the trial.

01:16:59PM 20 And I don't want to make too much of this. I'm
21 going to say it fits the pattern. We got it last night. You
22 look at it, it doesn't bear out what the Government said.

23 The Government said he had three assaults. Well,
24 there's actually two assaults and one fighting.

01:17:14PM 25 There are 23 incidents. You know, we get this --

1 as I said, we got this over the transom last night -- in a
2 colloquial way. We got it over the e-mail last night 23
3 incidents. More than half of them either no disciplinary
4 action or he was not convicted.

01:17:32PM 5 I noticed last week the Court got kind of a
6 discovery request. There is what I'll suggest is kind of this
7 frantic effort to characterize the Chad Marks that sits there
8 today to do anything really that in a way -- to characterize
9 the Chad Marks who sits there today, 17 years after he was
01:18:01PM 10 first incarcerated on this case, as the street punk that you
11 described. I'm sorry I keep saying that, but that you once
12 described.

13 And, you know, you get -- and you saw it with
14 Wascher. Well, he's arrogant. Well, okay, fine. He's not
01:18:22PM 15 the most docile inmate Wascher had to deal with. Not the most
16 docile person that this AUSA has provoked in his career.

17 But so what? That's not a prerequisite for
18 extraordinary and compelling circumstances. And it certainly
19 is not a reason to guess that he must have coerced Thomas
01:18:43PM 20 Moore to take the fall for that SIM card. That's not what you
21 should expect of a Government investigator.

22 And the results of it and the way the results of it
23 were cast to this Court are not what you should expect of an
24 AUSA. You should expect more.

01:19:01PM 25 And I'm going to -- just to finish up on the

1 belatedly relied upon alleged criminal activity. It has not
2 been proven. This Court should conclude it has not been
3 proven.

4 If you conclude that it has, I suggest to you that
01:19:19PM 5 in the entire mix of facts this Court has before it in terms
6 of whether they're extraordinary and compelling reasons, it
7 doesn't warrant in any respect a diminution in the appropriate
8 reduction of sentence that this Court should effect based on
9 our motion.

01:19:35PM 10 I know the Court has more facts before it. I'm not
11 gonna -- I'm not gonna, you know, bring up -- I'm gonna -- I
12 know you're gonna make a decision today based on the facts as
13 you heard them, the arguments as you heard them, but I'm sure
14 you're mindful as we are that you told the Assistant U.S.
01:19:56PM 15 Attorney that if you were to have imposed a 15 year sentence,
16 had you been able to, Judge, or at least based on what you
17 knew at the time you wrote that letter, we respectfully
18 suggest to the Court that its wisdom in reaching that
19 conclusion after being apprised of the rehabilitation of Chad
01:20:16PM 20 Marks was spot on.

21 And the last thing I'm gonna say before I sit down
22 is this : I also think what you're seeing here in this
23 courtroom, honestly -- honest to goodness, separate and apart
24 from the discrete facts of this case -- I think you're seeing
01:20:34PM 25 the natural institutional response to Congress returning a

1 little bit of power to judge -- back to judges.

2 There is -- there is really no justification for,
3 in my mind, I'll suggest to you, there is no reasonable
4 justification for this conduct by the Government when really
01:21:04PM 5 what's at issue is this Court's been afforded the opportunity
6 to take a second look in only a very narrow slice of cases,
7 ones presenting extraordinary and compelling reasons, and to
8 blunt what is, I think by any reasonable person's measure, an
9 accessibly harsh sentence.

01:21:26PM 10 And there's really, I'll suggest, no legitimate
11 reason for the virulence, for the unscrupulousness -- I'll say
12 that -- of this push back. I suggest that respectfully.

13 Thank you, Judge.

14 **THE COURT:** Before you sit down, let me ask at least
01:21:44PM 15 one question here. I think the Government has already
16 addressed this in its -- perhaps both of its filings, but the
17 question relates to Congress' decision not to make the
18 stacking provision retroactive. The stacking is what caused
19 the onerous sentence that Mr. Marks faces, five years plus 25
01:22:12PM 20 years.

21 The Government suggests that really precludes the
22 Court from granting the relief here. That if Congress
23 intended some retroactive effect, they could have said so.

24 Another argument could be made that just because
01:22:41PM 25 Congress elected not to make the stacking provisions under

1 924(c) retroactive, that doesn't speak to the discretion the
2 Court has under the statute on which you move. That the Court
3 could still consider the seachange in the law now that
4 stacking is no longer appropriate.

01:23:15PM 5 Not unexpectedly, the Government suggests that
6 Congress really has already spoken on this, Judge, but how
7 would you -- what would you like to be heard to say about
8 this?

9 The Court's going to have to deal with it, the fact
01:23:31PM 10 that Mr. Marks does not automatically get the benefit of the
11 anti-stacking provisions. If he did, we wouldn't be here.

12 So, you know, how much should the Court consider
13 the congressional action to change the stacking in deciding
14 your motion?

01:23:52PM 15 **MR. GLEESON:** I suggest here's how the Court should
16 consider it: If Congress had made the -- we'll call it the
17 anti-stacking part of the First Step Act retroactive, every
18 single 924(c) in the U.S. -- in the prison system would have
19 presumptively an application to go back before the sentencing
01:24:19PM 20 court.

21 As all of the Fair Sentencing Act folks -- Fair
22 Sentencing Act provisions were made retroactive -- sorry.

23 **THE COURT:** That they have done that.

24 **MR. GLEESON:** Yes, they come back. They would
01:24:35PM 25 presumptively have an application. It's not automatic as the

1 Court knows.

2 Congress didn't do that. We acknowledge that. At
3 the same time there's an existing statute 3582(c)(1) that
4 Congress amended to allow inmates to come back directly to
01:24:57PM 5 their sentencing judge and to make an application for a
6 reduction of sentence based on extraordinary and compelling
7 reasons.

8 There are obviously other bases set forth in that
9 statute, but we're relying on extraordinary and compelling
01:25:14PM 10 reasons.

11 And neither at the time nor now is there any reason
12 based on the text of that statute for this Court to conclude
13 that someone who is serving stacked 924(c) sentences is
14 ineligible for that avenue of relief.

01:25:37PM 15 As I mentioned to you the last time I was here, you
16 would think the Government's argument that this Court's
17 precluded from considering this ground of sentence reduction,
18 you would think the Government's argument, you would look at
19 3582(c)(1) and you would say there's an exception here for
01:25:59PM 20 924(c) stacking. There's none.

21 Congress was aware of the bases of relief under
22 3582(c)(1). They include extraordinary and compelling
23 circumstances. Every single inmate can make such an
24 application. It was aware that there was a BOP gatekeeper
01:26:20PM 25 provision that wasn't working. They never opened the gate.

1 So it said we're taking BOP out of the way, the
2 inmates can come in directly. And they did not say, by the
3 way, all inmates except 924(c) stacking victims can come to
4 the Judge Larimers in our system. And they could have said
01:26:43PM 5 that. They didn't. Text is text.

6 **THE COURT:** Maybe Congress passing that expansion of
7 3582(c) knew that another statute under the First Step Act,
8 the anti-stacking provision, provided that there would be no
9 retroactive effect. One could argue that Congress didn't need
01:27:10PM 10 to add any prohibition under 3582(c).

11 I mean, I'm not -- I'm just being the devil's
12 advocate here.

13 **MR. GLEESON:** Understood. And to finish my thought
14 about how you should view it, the -- I'll suggest to the Court
01:27:28PM 15 it's perfectly logical to suggest that Congress decided not to
16 presumptively -- not to provide a presumptive motion to every
17 924(c) stacking inmate.

18 But, rather, decided that if relief was gonna be
19 afforded to such an inmate, any such inmate, it would only be
01:27:51PM 20 in the very narrow slice of the inmate population whose
21 circumstances viewed holistically present extraordinary and
22 compelling reasons.

23 And there is -- I say this respectfully, there is
24 no reason for you to read into -- read a limitation into
01:28:11PM 25 3582(c)(1) that is not there. That is, to imply from the fact

1 that -- that the anti-stacking provision was not made
2 retroactive, to imply that in the amended 3582(c)(1), that
3 means there is an implied exception for 924(c) stacking
4 victims.

01:28:36PM 5 The result of the legislative enactments that I
6 described to the Court is a legislative determination that a
7 very narrow slice of the inmates in the Bureau of Prisons who
8 are subjected to 924(c) stacking will have an application to
9 go back to the District Court and present extraordinary and
01:29:01PM 10 compelling reasons, only one of which would be that he was
11 subject to a sentencing regime that was so onerous that
12 Congress decided no one else would be subjected to it.

13 It would be kind of ironic, I suggest to the Court,
14 that -- think about it this way. Think of the irony of this.
01:29:24PM 15 These are bone crushing sentences. They're really harsh.
16 It's not a shrinking violent Congress that passed that
17 statute, and not a shrinking violent President that signed
18 it -- signed it into law.

19 They decided these provisions are so bad, that no
01:29:45PM 20 one will ever be subjected to them again. Think of the irony
21 associated with the fact that when they open up an avenue of
22 safety valve relief the way they did by taking BOP out, BOP
23 motion requirement out of 3582(c)(1), right?

24 They -- they open up an avenue to this Court, think
01:30:12PM 25 of the irony that you're gonna -- that the Government wants

1 you to imply into that a limitation, and this is the only
2 exception near as I can tell the Government's arguing, they're
3 gonna open up for a second look for sentencing judges to look
4 at extraordinary and compelling circumstances.

01:30:35PM 5 Think of the irony associated with except there's
6 this one category of folks who got really clobbered by
7 sentences we think are so excessive that nobody will ever get
8 them again, but they can't come in.

9 Judge, I'm gonna suggest to you that makes no
01:30:50PM 10 sense. Not only that, it's completely -- text as I keep
11 saying this, text is text.

12 One irony of this is the whole reason 924(c)
13 stacking happened wasn't because Congress intended it. It was
14 because the Supreme Court held in that *Deal* case back in the
01:31:17PM 15 '90's. Text is text. Second or successive could be in the
16 same case as the first. That's why we're here to begin with.

17 So, you know, what's sauce for the goose is sauce
18 for the gander. And if text is text, and that's why he got
19 clobbered to begin with, I'm gonna suggest to you that it's
01:31:35PM 20 good enough for us to say you read 924 -- 3582(c)(1) and it
21 doesn't limit the category of inmates who can come to you to
22 seek the sentence reduction we're seeking by excluding 924(c)
23 victims I'll call them.

24 **THE COURT:** Thank you.

01:31:58PM 25 **MR. GLEESON:** Thank you.

1 **THE COURT:** You wish Mr. Marks to address the Court?

2 **MR. GLEESON:** Yes. Do you want him to do it now,
3 Judge?

4 **THE COURT:** Yes.

01:32:07PM 5 **MR. GLEESON:** Okay, come on up. Come up here, is
6 that all right?

7 **THE COURT:** All right with me. Mr. Marks, good
8 afternoon.

9 **THE DEFENDANT:** Good afternoon to you.

01:32:27PM 10 **THE COURT:** We're not discussing legal issues now.
11 Your attorney and the Government have supplied the Court with
12 that, but the nature of this proceeding, although it's not
13 technically like a sentencing, it certainly relates to that.

14 So I'm exercising some discretion to give you a
01:32:44PM 15 chance to address the Court.

16 **THE DEFENDANT:** Thank you. I'll like to start off
17 by saying that Psalms 21 once said the heart of the King is in
18 the hands of the Lord. I know that it's by your mercy, your
19 compassion and God's grace that I'm even here today and I want
01:32:59PM 20 you to know that I'm grateful.

21 I know that I made some irrational and
22 irresponsible choices many years ago to engage in drug
23 trafficking, possession of weapons. I'm guilty. Guilty of
24 every one of them charges.

01:33:09PM 25 I'm not that person no more. I'm not. I've

1 learned to respect the rule of law. I've learned a lot about
2 the law, about our forefathers. Life, liberty and the pursuit
3 of happiness, it means something to me. I respect the rule of
4 law, Judge. I want you to know that.

01:33:27PM 5 There's been a lot of filings in this case so you
6 know my history. I never really had a father. I looked up to
7 my brother; my brother killed his self. I didn't have any
8 respect for men at all in my life.

9 I came to respect you, and I mean that. And I say
01:33:45PM 10 that to say this: I don't know what's gonna happen. But I
11 want you to know that I would never disrespect you by
12 reoffending. I'd never violate post-supervised release
13 because my freedom means something.

14 Today's not simply about Chad Marks. Failure is
01:34:02PM 15 not an option. To fail is to disappoint you, disappoint Judge
16 Gleeson, Marisa Taney, Elizabeth Costello, all the people over
17 there, Jill Harrington, Families Against Mandatory Minimums.
18 These people believe in me. So failure is not an option.

19 I came to prison with a 40 year sentence. Tough.
01:34:18PM 20 Not something easy to deal with. But I dealt with it. And I
21 learned, and as I learned I knew that it wasn't just about me
22 doing time. I owed more than just doing time.

23 That's why I decided to go to the Alternative
24 Violence Project seminar. Then after that I started
01:34:34PM 25 facilitating. There's a brotherhood in there, we change lives

1 in there. Leaders Breed Leaders taught people how to be real
2 men, real fathers. I didn't know what that was many years
3 ago, but I do now.

4 Then I went to FMC Lexington and there was this old
01:34:50PM 5 man trying to push his self to commissary one day. I decided
6 to push him. His name was Foster Davis. He was a Vietnam
7 vet, tunnel rat in Vietnam, won a bunch of awards.

8 I made a promise to come to church Friday night,
9 which I do every week, Fridays and Sundays. And we started
01:35:08PM 10 talking. I helped him and I kind of formed this thing I
11 called the Wheelchair Ministry. I got some of the other
12 brothers to start helping people. We start getting people
13 from the Medical Unit, we start taking them to church, we
14 start taking them to commissary. We couldn't push them --
01:35:21PM 15 they couldn't get themselves in places, Judge. It mattered.

16 It mattered.

17 So we started that Wheelchair Ministry. Foster
18 Davis, I take him outside, walk him around. He always used to
19 say, man, you're my buddy. Really, he was my buddy.

01:35:34PM 20 I did his compassionate release, I did his clemency
21 petition. Four weeks ago he died. But he didn't die in
22 prison. He didn't die alone. He died with his family. That
23 was important to him. Something I was afraid of.

24 And Criminal Legal News sent me out a thing, they
01:35:53PM 25 wanted me to write an article about -- about Lester Holt. He

1 visited a prison in Louisiana, went to the Hospice Unit. And
2 there was old man in there, been in prison 45 years. He asked
3 him to open his candy for him, couldn't even open his candy.

4 That motivated me to go to the chaplain at FMC
01:36:11PM 5 Lexington. I said, hey, no one is up here ministering to
6 these guys and they're dying, I want to go up there.

7 The only way I could do that is if I refused to go
8 to lunch on Saturdays. So I did it. I went up there. I
9 administered love of Christ to them guys up there.

01:36:24PM 10 And in the process I worked with them on some
11 compassionate release motions, wrote their stuff for them,
12 sent it off to the attorneys, I built some relationships at
13 FAMM. I did the work because the lawyers were overburdened.
14 I sent that stuff down there all for free.

01:36:37PM 15 I go up there and minister guys. A lot of them
16 guys didn't want to hear that, Judge. They'd been up there --
17 they had been in prison 35, 30 years. So I had to find a way
18 to break in and they didn't have no money, they can't buy
19 commissary, they can't work.

01:36:50PM 20 So I take snacks up there to them. For some reason
21 they all like animal crackers and that was my opening, believe
22 it or not, animal crackers.

23 I just want you to know that I appreciate you. I
24 appreciate today. I appreciate life. Life means something.
01:37:06PM 25 I made some bad choices. But I want you to know -- and I mean

1 this -- that I'll never reoffend because I appreciate my
2 freedom. I would never disrespect you because I have enormous
3 amount of respect for you.

4 And with that I wish you a Merry Christmas. You
01:37:22PM 5 too... you guys have always been kind to me and I appreciate
6 you.

7 **THE COURT:** Thank you, Mr. Marks. Two things.
8 Mr. Marks, I get a chance. You know, you and I go back a long
9 way. I presided at the trial. I remember many of the facts
01:37:42PM 10 at the trial. The Government has pointed many of them out in
11 their filings.

12 You did say you made bad judgments. That would be
13 an understatement in terms of drug dealing and some violence
14 and threats.

01:37:55PM 15 The Government suggests that there's no guarantee
16 that you won't do that again if you're released. Your lawyer
17 suggests that the Court can provide some protection by
18 imposing conditions in supervised release.

19 But I'd like to give you the opportunity to
01:38:20PM 20 address the Government's suggestion as to that -- that, you
21 know, a leopard can't change his skin. You did certain things
22 in the past and there's no guarantee that you won't do them
23 again.

24 The second thing you might comment on, the
01:38:36PM 25 Government suggests that, either directly or inferentially,

1 that the courses and all the religious activities and others
2 that you engaged in is an effort to play the Court. To --
3 that it's not really -- it's done for a purpose.

4 Any thoughts on either of those two --

01:39:08PM 5 **THE DEFENDANT:** Yeah.

6 **THE COURT:** -- points?

7 **THE DEFENDANT:** The first thing I want to say is
8 this: I know you've been around a long time, you know when
9 people come up here and lie to you. I know that. And I pray
01:39:16PM 10 that you see the sincerity in me.

11 As far as the programs goes, I didn't have to do
12 any of that stuff, Judge. None of it. I could have went to
13 prison, stayed in Big Sandy, the most violent prison in the
14 United States, hands down. There ain't a state prison that
01:39:29PM 15 can hold a flame to it. I could have took that road, but I
16 didn't.

17 Were there some problems? There were some problems
18 100%. And I don't know if I'm allowed to speak about the
19 factual basis, but -- as far as the fights go, if you --

01:39:44PM 20 **THE COURT:** No.

21 **THE DEFENDANT:** As far as reoffending, I mean this
22 from the bottom of my heart, I respect the rule of law and I
23 respect my freedom. It's small things, Judge, driving here
24 and you see houses, you see dogs.

01:39:58PM 25 FMC Lexington we see -- it's this small. You see

1 horses coming by the prison, you learn to appreciate them
2 things. Those are the small things that you learn to
3 appreciate.

4 Will I reoffend? People can stand here and say,
01:40:10PM 5 you know, hey, we never know. But I can tell you this: If I
6 were released -- I told you before in a letter I think I
7 wrote -- I'm suffering. I am. I'm suffering. And I know
8 what that suffering is like.

9 Reoffending for me, I mean, anyone can stand up
01:40:24PM 10 here and tell you this -- I'm telling you now from the bottom
11 of my heart, I know -- I know that I'm not gonna reoffend,
12 Judge, because I appreciate that freedom.

13 I know what it's like to lose your freedom. I know
14 what it's like to go to bed at night hungry. I know what's it
01:40:38PM 15 like -- and I get embarrassed real easy about family stuff,
16 but my mother's sick. She's been sick. By the grace of God
17 she's still here. I do love my mother. Two weeks ago my mom
18 was homeless. So reoffending disappoints my mother.

19 Never gonna reoffend. Never. Did I do some bad
01:40:58PM 20 things? 100%. And I didn't want to comment on this because I
21 thought you wanted Mr. Gleeson to stay away from it -- street
22 punk, I was worse than a street punk. 100% worse than a
23 street punk. Thought I knew everything, thought I was smarter
24 than everybody.

01:41:11PM 25 But you know what, Judge? You grow up, you learn.

1 You learn that, hey, look, that's not who you want to be. You
2 go look in that mirror. Look in that mirror every day.

3 I pray every day. On my knees every day. Because
4 I do want to change my life. Am I perfect? No. If I were
01:41:28PM 5 released, the first place I'd go today is Victory Baptist
6 Church in Henrietta, let them know I'm here, not even going to
7 go to my mother first. I'm going to the church, let them know
8 who I am.

9 This is what I want to do. Because I know that I
01:41:38PM 10 have to have that. I have to be rooted there. I have to be
11 rooted in that church.

12 The next thing I'd be doing is I'd immerse myself
13 in criminal justice reform. I made a lot of relationships,
14 I'm sure the Court knows, with many attorneys. Many.

01:41:51PM 15 Sean Hopwood, dear friend of mine, law professor,
16 former federal inmate. Former federal inmate went on to
17 become -- won two cases in the Supreme Court as a jailhouse
18 lawyer.

19 I mean, those guys are making it. Brandon Sample,
01:42:05PM 20 post-conviction attorney. These guys were in federal prison.
21 They're making it.

22 I'm not gonna disappoint. And you know something
23 else? I'm not gonna disappoint Mr. Rodriguez. I'm not. I
24 want to prove -- I want an opportunity to prove to you.

01:42:20PM 25 And I can say this, and I'll close, I don't deserve

1 another day in there. Maybe I should have went to prison
2 100%, there's no doubt about that. But there's nothing left
3 to gain. Wasting tax dollars.

4 I just -- I want you to know I mean what I say, say
01:42:39PM 5 what I mean. Thank you.

6 **THE COURT:** Thank you.

7 Mr. Rodriguez, would you like to present?

8 **MR. RODRIGUEZ:** Thank you, Judge.

9 I'll start by pointing out the obvious, which is in
01:43:31PM 10 this case, in this proceeding the defendant bears the burden.

11 And I think unlike a trial where you would never
12 hold the defendant's silence against them, you would never
13 hold his reluctance or refusal to testify under oath against
14 him, in this case I think you should.

01:43:49PM 15 Because we talked about testimony, we talked about
16 him getting on the stand under oath, and he didn't do it. He
17 stood up here and said things to you not under oath, not
18 subject to cross-examination. So I think Your Honor can take
19 that into account in determining whether the defendant has
01:44:04PM 20 borne its burden.

21 Judge, there's a lot of -- we submitted a 24 page
22 legal memorandum arguing the law. We stand by those
23 arguments. I won't repeat them. I think the Court has
24 reviewed them.

01:44:25PM 25 Simply to point out that we believe the First Step

1 Act is clear: If Congress had wanted to give the courts
2 discretion to allow inmates out early because of the double,
3 consecutive 924(c) sentences, it would not have specifically
4 ruled that the change in the law with respect to consecutive
01:44:46PM 5 924(c) sentences only applies to people who are sentenced
6 after December of 2018.

7 **THE COURT:** Well, Mr. Gleeson suggested that there's
8 no reference in 3582(c) to any statute or any other thing that
9 would prevent the Court from considering the seachange in the
01:45:07PM 10 law.

11 I mean, it's obviously an issue the Court has to
12 deal with because Congress did determine that the action be
13 retroactive, but I think Mr. Gleeson suggests, you know, that
14 might have resulted in many, many applications by those who
01:45:26PM 15 really didn't warrant relief.

16 In this case maybe it is something the Court could
17 consider. I mean, I know your position is that the Court
18 shouldn't and can't, but all we have really is Congress
19 deciding to expand the scope of Section 3582 to some extent by
01:45:52PM 20 eliminating the gatekeeper requirement that the Bureau of
21 Prisons held.

22 One could view that as some liberalization of the
23 relief afforded there --

24 **MR. RODRIGUEZ:** Judge --

01:46:06PM 25 **THE COURT:** -- to the extent judges have discretion,

1 you know, woefully absent from many years when the guidelines
2 were mandatory. Now we have much more than we used to have
3 thanks to Justice Breyer and others.

4 But maybe it just boils down to that, that under
01:46:26PM 5 Section 3582 the Court has a lot of discretion: It may
6 consider quite a few factors in determining whether this
7 particular man warrants the extraordinary relief that he
8 seeks.

9 **MR. RODRIGUEZ:** Judge, as we argued last time we
01:46:45PM 10 were in front of you, we don't -- we don't dispute that Your
11 Honor has enhanced discretion under the First Step Act. We
12 don't. I mean, the Congress intended to allow the courts more
13 discretion.

14 Our argument here is that if you read the statute,
01:47:02PM 15 Congress cannot be deemed to have intended for a judge to
16 exercise that discretion so as to reduce sentences that were
17 based on consecutive 924(c) sentences imposed prior to
18 December '18. A fair reading of the law does not support that
19 interpretation.

01:47:19PM 20 And, Judge, even if you were to consider, and I
21 know it's -- the law is relatively new, cases have evolved,
22 but even if you were to consider the type of cases where this
23 discretion has been used, the defendants in those cases are
24 nothing like this defendant.

01:47:34PM 25 Even the case that Your Honor cited last week, I

1 forget the name of it, where the District Court indicated that
2 it had the discretion, but decided not to exercise it. Even
3 if -- that case, as I recall, that defendant had no
4 disciplinary record while in prison.

01:47:53PM 5 To grant -- so our argument is both on a macro
6 level and a micro level. On a macro level we've argued here
7 the law -- we believe that the law in this case warrants
8 denial. We respectfully submit the law does not allow the
9 Court to grant early release in this case.

01:48:11PM 10 But if we look at who Mr. Marks is, I may be
11 mistaken, but I did not find any cases where a defendant was
12 allowed early release that in any way -- in any way resembled
13 Mr. Marks' circumstances.

14 The three or four cases cited by the defendants in
01:48:30PM 15 their first -- defendant in their first set of cases were
16 completely different defendants, inmates: They were old, they
17 were elderly; one woman had breast cancer, one breast, and it
18 seemed to be spreading in the other; another man had very
19 serious illnesses.

01:48:47PM 20 **THE COURT:** That traditionally was the way Section
21 3582 was viewed, I grant you that. It was called
22 "compassionate release" and , you know, it often was a vehicle
23 for very sick inmates to get some relief in their dying last
24 days.

01:49:04PM 25 I think Mr. Marks and his counsel would say, well,

1 the statute's been expanded somewhat now, Judge. And you say
2 well, it has, but still Mr. Marks was not the person -- the
3 type of person, based on his record, et cetera, that should
4 get the benefit of that.

01:49:23PM 5 **MR. RODRIGUEZ:** That is correct. And in this case
6 we argue -- we believe that he is not.

7 **THE COURT:** In your comments at some point you
8 might, you know, I've sentenced many, many people over the
9 last 32 plus years, and they all have an aspect of the
01:49:41PM 10 sentencing where there's supervised release. Many conditions,
11 some onerous.

12 One might say the concerns you have about Mr. Marks
13 slipping back into drug activity or violence, I would ask you
14 why couldn't that be dealt with like we do every other inmate
01:50:03PM 15 with, in this case, a pretty extensive term of supervised
16 release? We do it with everybody: Robbers, rapists, child
17 porn people. Why wouldn't it work here?

18 Let me say there's no guarantee where -- both of us
19 have been in the business too long to know very little can you
01:50:23PM 20 guarantee. One might say, you know, you don't appreciate
21 things until you lose them: You don't appreciate your health
22 until you lose it, you don't appreciate sometimes a spouse as
23 much as you should until you lose him or her. And Mr. Marks
24 has suggested his freedom means too much to him to go down the
01:50:44PM 25 road that he was there before.

1 So that's a lengthy question, but I guess why not
2 supervised release if you're really concerned that he might --

3 **MR. RODRIGUEZ:** Because supervised release does
4 not -- I'm sorry, Judge. I didn't mean to cut you off.

01:50:58PM 5 **THE COURT:** Happens all the time.

6 **MR. RODRIGUEZ:** I apologize for doing it all the
7 time.

8 First, because the law provided for a ten year
9 mandatory on the drugs, a 30 year mandatory minimum on the two
01:51:11PM 10 gun counts. And under 3582(c) the Court cannot diminish that
11 without -- without appropriate reasons, and none exist here.

12 **THE COURT:** The Government says you really don't get
13 to supervised release? You can't -- that's really irrelevant,
14 Judge, because you shouldn't be releasing him?

01:51:28PM 15 **MR. RODRIGUEZ:** Yes, that's our first argument,
16 Judge. And we believe it's a strong argument.

17 Now, but even if Your Honor were to consider, well,
18 can't we protect against criminal activity by Chad Marks if we
19 release him? Your Honor, releasing him under supervised
01:51:44PM 20 release in no way guarantees or no way even assures that he's
21 not going to commit criminal activity.

22 He was incarcerated under the most secure
23 circumstances around. He wasn't just under supervision while
24 he was out; he was incarcerated and he violated conditions:
01:52:05PM 25 He beat up inmates.

1 And I'm not talking about just in BOP. I'm also
2 talking about when he was at MCJ, Monroe County Jail; also
3 while he was being held in Batavia. I know that was a long
4 time ago, Judge, but if you're trying to --

01:52:20PM 5 **THE COURT:** That's what the defense would say, that
6 it has been decades ago and --

7 **MR. RODRIGUEZ:** Judge, if you're trying to
8 determine --

9 **THE COURT:** The Government is suggesting, you know,
01:52:29PM 10 there's no ability for redemption. Obviously, guarantee --
11 it's like a bail consideration. The way I can guarantee that
12 someone's not going to flee or not going to engage in criminal
13 activity is to lock everybody up. And, you know, you can't do
14 that.

01:52:46PM 15 There's always a risk. And I guess one of the
16 factors that eliminates risk is terms of supervision.

17 **MR. RODRIGUEZ:** But, Judge, I would argue two
18 things. One is again it is not our burden in this proceeding
19 to show that Mr. Marks will not -- will be a danger. It is
01:53:07PM 20 their burden to convince you that he will not be a danger,
21 number one.

22 Number two, you have to look at his prior conduct.
23 Your Honor has said in court many times when Your Honor has
24 sentenced defendant s, when Your Honor has been back on
01:53:21PM 25 supervised release violations where you tell them, yes, a lot

1 of people come in here and they promise me this will be the
2 last time, and Your Honor knows better than I that oftentimes
3 it is not.

4 You look at the defendant's prior behavior to gauge
01:53:38PM 5 what his future behavior will be. And with respect to this
6 defendant, unlike any other defendant that I've been able to
7 find who has been released early under this changed law, that
8 this defendant has engaged in criminal activity, has engaged
9 in violent activity while incarcerated. Not just pretrial,
01:54:00PM 10 not just presentence, but post-sentence.

11 While in BOP he was, if I count correctly, he was
12 charged five times. I'm not talking about the stuff that
13 happened recently in Lexington. He was charged five times
14 with disciplinary violations. As I recall, one was for trying
01:54:20PM 15 to bribe a guard. I think that was the last one in 2013.

16 And then the other four related to violence. He
17 was fighting in one of them. I think at least one of them
18 involved an assault.

19 So this is not a defendant if Your Honor -- Your
01:54:33PM 20 Honor always does this -- Your Honor is trying to look into
21 the future, in some ways read your crystal ball and say what
22 can I expect this man to do if I release him? You have to
23 consider what he's done in the past. And what he's done in
24 the past is violate.

01:54:50PM 25 Now, Judge, Your Honor -- and I'm gonna talk about

1 this street punk notion because I think it's an important one.
2 I think the first time it was used, I think it was in Your
3 Honor's letter to the Clemency Unit. Mr. Gleeson picked it up
4 in his papers, and Mr. Marks is running with it.

01:55:12PM 5 What's that mean? Mr. Marks when he was engaging
6 in his criminal activity -- we need to go back and remember,
7 he wasn't just some street urchin who was on the street doing
8 the bare minimum to survive and stay alive.

9 You'll recall that this man had a roofing business,
01:55:33PM 10 it's in the presentence report, he had a roofing business, a
11 construction business, and he also had that pizza shop.

12 So the notion that Chad Marks had no options, that
13 he was completely out in the world and really had nothing --
14 no chance but to -- but to break the law is not him.

01:55:53PM 15 Now, if you say a street punk is simply somebody
16 who was young and should have known better, he's a bright guy.
17 Your Honor knows this as well as I do. You have read his
18 letters. We've seen the letters to counsel.

19 Remember when we did the hearing where we were
01:56:12PM 20 trying to determine whether he would take 20 years or not?
21 Ms. Harrington provided us the letters. He would submit legal
22 arguments to Don Thompson. He would argue with Don Thompson
23 about what his guideline ranges should be.

24 So, again, Judge, I respectfully challenge the
01:56:30PM 25 notion that he was a street punk if street punk means just

1 some violent little thug who didn't know any better.

2 This man knew better, and he knew better after he
3 was sentenced when he engaged in violence in the prison.

4 **THE COURT:** I'm not sure my use of the term street
01:56:48PM 5 punk was -- I mean, he was engaged in many bad acts, he was a
6 punk. I mean, whether we, you know, get stuck on semantics, I
7 accept your point. He was --

8 **MR. RODRIGUEZ:** And he beat up people, Judge. I
9 mean, he beat up Dominic Malia. He bragged about it.

01:57:12PM 10 **THE COURT:** I remember.

11 **MR. RODRIGUEZ:** And Dominic Malia had to go to the
12 hospital twice as a result of what Chad Marks did to him.

13 In his papers, the things in his letters he -- I'm
14 embarrassed, I'm embarrassed by some of the things I said.

01:57:25PM 15 Things he said? How about the things he did? It's
16 not just those horrible letters that he wrote to his wife
17 about what he was gonna do to those little girls and to his --
18 excuse me for the language, but it's his -- to his -- to her
19 nigger, Spic boyfriend when he got out. It's not just the
01:57:46PM 20 words he used. It's his actions to follow those words.

21 Now, I'll end here , Judge, and I need to be a
22 little careful because I in no way -- and I mean this -- I in
23 no way want to suggest that you're in any way gullible or that
24 you don't understand human nature. I understand a lot better
01:58:06PM 25 than I ever will.

1 **THE COURT:** Go ahead and say whatever you want to
2 say.

3 **MR. RODRIGUEZ:** But it's important to point out from
4 the very earliest times that he was incarcerated this
01:58:16PM 5 defendant intended to play up religion because he knew you
6 were a religious man.

7 It's in his correspondence. He wrote it. He told
8 this inmate -- he wrote it in a letter to Don Thompson. He
9 wrote it in a letter to Don Thompson where he pointed out that
01:58:34PM 10 he's gonna take religion classes in order to try to get a
11 reduced sentence.

12 **THE COURT:** I'm not really all that religious.

13 **MR. RODRIGUEZ:** What's that?

14 **THE COURT:** I'm not really all that religious.

01:58:45PM 15 **MR. RODRIGUEZ:** Well, he thinks you are, which is
16 obvious by his letters to the Court, which is obvious by the
17 first statement he made when he came up here. He started
18 quoting Jesus Christ. He starts his letters quoting the Lord
19 and ends his letters quoting the Lord. He clearly is trying
01:58:59PM 20 to appeal to what he thinks Your Honor feels strongly about.

21 And the thing is, Judge, he has been doing this
22 from the very outset of this case. Ms. Chartier attached
23 certificates of the classes that he took, it's part of the
24 record, I've got them somewhere here, the classes that he took
01:59:24PM 25 when he was incarcerated. I think they're Exhibit G to maybe

1 the defendant's submissions.

2 I've got them here, the defendant's sentencing
3 submissions. And back then Chad Marks attached a certificate
4 from Growing Kids God's Way January of 2004.

01:59:48PM 5 A certificate from Clean Ministry Addictive
6 Recovery Program, January 2004.

7 Certificate about anger management.

8 A certificate from Good News Jail and Prison
9 Ministry, Bible correspondence course.

02:00:05PM 10 And I would have asked him all this, by the way, on
11 cross-examination, but I didn't get a chance.

12 Another certificate from Good News Bible
13 correspondence course, this one was for the Gospel of John --
14 first one was the Gospel of John - Unit I; the Gospel of John
02:00:19PM 15 - Unit II; Gospel of John - Unit IV; Philippians; the Epistle
16 of 1 John; Thessalonians; Romans - Unit I; Ephesians; and
17 Gospel of John - Unit III.

18 What's interesting about this is that at the same
19 time that he was taking these classes, Judge, at the same time
02:00:48PM 20 he was taking these classes he was assaulting fellow inmates
21 at BOP and at Batavia, and he was sending letters threatening
22 to rape his wife, to torture little girls and to cut off the
23 penis of his wife's boyfriend and shove it down the throat of
24 his daughter.

02:01:06PM 25 So he can sit here and cite hundreds of hours of

1 classes that he's taken while in prison. Mr. Wascher pointed
2 out that that in no way suggests that a person is not
3 dangerous or won't be.

4 But he's been playing this game from the very
02:01:27PM 5 outset and I respectfully submit that he is continuing to play
6 it, and that if you release him none of -- none of these
7 classes will in any way be determinative of how he will behave
8 when he gets out.

9 The last point, and I'm gonna rest on the papers,
02:01:46PM 10 Judge, that I submitted with my briefs both in my initial memo
11 and in my reply memo, this is his motion, but when Your Honor
12 decides it I would ask Your Honor to also think about some of
13 the other remarks, which is the community in which he will be
14 put and the people who he threatened to kill and to torture
02:02:11PM 15 and rape. He wrote these threats. They are in his
16 handwriting.

17 And those people are out there and they will be
18 literally at his mercy when he comes out. And no ankle
19 bracelet, no home confinement, nothing short of keeping him in
02:02:34PM 20 will ensure that they are not hurt while he gets out.

21 This man does not deserve early release, not under
22 the law, nor does he deserve early release as a result of who
23 he is. He is a dangerous person who knows how to play the
24 game and he should remain inside, incarcerated for the 40
02:02:56PM 25 years that Your Honor correctly sentenced him to in 2011, I

1 believe. Thank you, Judge.

2 **MR. GLEESON:** Judge, can I be heard briefly?

3 **THE COURT:** Just two minutes.

4 **MR. GLEESON:** Two minutes, okay.

02:03:10PM 5 **THE COURT:** Maybe four.

6 **MR. GLEESON:** I'll do it. If nothing short of
7 keeping him in would protect those people, then Mr. Rodriguez
8 wouldn't have offered a 20 year deal because all those threats
9 existed back when that deal was offered.

02:03:24PM 10 Second, Judge, please don't regard the relief we're
11 asking for as extraordinary. It just seems that way because
12 judges can be judges again.

13 And I don't want to quibble with the Court, 3582(c)
14 wasn't expanded. It was used as a vehicle for release for --
02:03:47PM 15 for people of advanced age with infirmities only because those
16 were the only circumstances in which BOP opened the door. It
17 has always been a safety valve. It just was never used that
18 way.

19 Of course, if a guarantee that people would not
02:04:05PM 20 recidivate were a condition precedent for them leaving prison,
21 no one would ever leave prison.

22 Second, the one thing I'll mention that hasn't been
23 mentioned, you know, you can rely on social science about
24 violent crimes and recidivation and how age -- people age out
02:04:21PM 25 of violent crime.

1 And if you look at the social science, and I'm
2 happy to brief this if the Court finds it helpful, Chad Marks
3 has aged out of violent crime.

4 This whole thing about the game, it's just -- it's
02:04:38PM 5 so much more cynicism -- and let me just use Mr. Rodriguez's
6 argument myself. In 2004 there was programming and at the
7 same time he was taking -- he was engaging in violent conduct.

8 From 2013 forward, really the last bit of violence
9 in his record is July of 2010. From 2010 forward he's
02:05:06PM 10 engaging in programming, but there's no violence, there's no
11 hints of the sort that this -- that this argument suggests.

12 I'll suggest to you that take the same rubric that
13 Mr. Rodriguez has placed before the Court and it shows that
14 Mr. Chad Marks has, in fact, changed.

02:05:27PM 15 Last thing I'll do, I don't know how far into my
16 four minutes I am, I'm going to suggest to the Court that the
17 one thing that crystallizes the Government's approach to this
18 case is what Mr. Rodriguez said when he stood up. This is a
19 criminal case. This is a federal criminal case in a federal
02:05:48PM 20 courtroom and you've been asked by the Government to hold Chad
21 Marks' silence against him.

22 That is just jaw dropping. It is so fundamentally
23 wrong, so fundamentally revealing of how far -- how invested
24 the Government has become in this case.

02:06:09PM 25 I urge the judge to exercise -- I urge the Court to

1 exercise the discretion that's been afforded you. It's not
2 extraordinary. This is exactly the sort of safety valve
3 Congress originally had in mind and has finally allowed direct
4 access to the courts for you to invoke. Thank you.

02:06:28PM 5 **THE COURT:** Thank you.

6 **MR. RODRIGUEZ:** One last thing.

7 **THE COURT:** Everybody wants the last word.

8 **MR. RODRIGUEZ:** It will be ten seconds long.

9 **THE COURT:** What?

02:06:35PM 10 **MR. RODRIGUEZ:** Ten seconds long.

11 He was not silent. He has never been silent. He
12 got up here and spoke. What he did not do was swear and allow
13 himself to be cross-examined. So the notion that somehow
14 we're questioning his right to remain silent, he didn't
02:06:50PM 15 exercise that right. He got up and spoke.

16 He sent Your Honor countless letters. I wanted a
17 chance to cross-examine him, and they chose not to do it under
18 oath.

19 **THE COURT:** All right, thank you all. As I think I
02:07:06PM 20 indicated before, the Court's not prepared to rule today.
21 There are many factual and legal issues the Court has to
22 decide. I will reserve. This has been pending for some time.
23 I know all have an interest in its prompt resolution, and I
24 will tend to it promptly.

02:07:25PM 25 Two things. Rules of evidence in these proceedings

1 don't appear to apply and I would think -- both sides had two
2 exhibits. They weren't formally moved, but I think they
3 should all be just part of the record.

4 **MR. RODRIGUEZ:** I don't have a problem with that
02:07:48PM 5 Judge. I think --

6 **THE COURT:** 1 and 2 and Exhibit A and B.

7 **MR. GLEESON:** Agreed.

8 **MR. RODRIGUEZ:** No objection.

9 **THE COURT:** All right. I think I have --

02:07:58PM 10 **MR. GLEESON:** Yeah.

11 **THE COURT:** Well, Exhibit A I have because that was
12 part of the Government's filing. Exhibit B I have a copy
13 here. And Exhibit 1.

14 **MR. RODRIGUEZ:** 1 and 2, Judge. I've got -- I've
02:08:18PM 15 got copies. Can I hand them up?

16 **THE COURT:** Okay. I don't think -- was Exhibit 1
17 attached to your papers at any point?

18 **MR. GLEESON:** Is 1 the incident report?

19 **MR. RODRIGUEZ:** Yes.

02:08:30PM 20 **MR. GLEESON:** That was attached to our reply brief,
21 Judge.

22 **THE COURT:** Exhibit 2, the affidavit of Wascher, was
23 attached.

24 **MR. RODRIGUEZ:** It was attached to my papers.

02:08:38PM 25 **THE COURT:** So I guess I have those.

1 **MR. GLEESON:** Judge, could you do whatever you can,
2 please, to have him sent back to the --

3 **THE COURT:** That's the second thing I was going to
4 talk about. I don't see any reason for Mr. Marks to be in
02:08:53PM 5 Youngstown. He could be removed to FMC Lexington or wherever
6 the Bureau of Prisons believes he should be incarcerated.

7 **MR. GLEESON:** That's our request.

8 **THE DEFENDANT:** Thank you, Your Honor.

9 **MR. GLEESON:** Thank you.

02:09:08PM 10 **THE COURT:** All right, Mr. Marks, the Court will --
11 I promise you that I will examine all the issues in this case
12 carefully. It's obviously most important to you, but it's
13 important to counsel and the Court as well.

14 Thank you. Have a nice holiday everyone. Have
02:09:29PM 15 safe travels.

16 **MR. GLEESON:** Thank you, Judge.

17 **MS. HARRINGTON:** Thank you, Your Honor.

18 (WHEREUPON, proceedings adjourned at 2:09 p.m.)

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CERTIFICATE OF REPORTER

In accordance with 28, U.S.C., 753(b), I certify that these original notes are a true and correct record of proceedings in the United States District Court for the Western District of New York before the Honorable David G. Larimer on December 17th, 2019.

S/ Christi A. Macri

Christi A. Macri, FAPR-CRR
Official Court Reporter